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THE STATUTE LAWS OF ALABAMA.

It has long been a matter of regret to our jurists that there is so great a diversity in the statutes of different states. Improvements, so called, have been made in each state, and with such a variety of success, that what is considered an evil in one is considered the perfection of reason in another. Our Solons have made root and branch work of it; they have piled precept upon precept, and law upon law, not made by one man or one set of men, but by different individuals, as honor pricked them on to substantiate their claims to immortality by "improving" the law, by overturning the structures of Coke and Bacon, to erect instead the disjointed columns of their own brain, without sufficient knowledge to place them on a sure foundation, or to inscribe thereon their meaning. Planned from a one-sided view of the object to be obtained, unconnected with any of the great principles of law,

"Arch and pillar lone"

stand ready to fall upon the heads of the wise architects. If all the "improvements" in law of all the states were put in force in one state, it would be worse than the confusion of tongues; it would not leave a vestige of that customary law whose prime custom, according to Lord Somers, is "resistance to tyranny." If perchance any real improvements have crept in from the civil law, they would be completely drowned by codes emanating from

brains too prolific to be governed by precedents in any quarter. Our law-givers spurn with contempt the injunction contained in an old book of precedents: "Inquire, I pray thee, of a former age, and prepare thyself to the search of their fathers; shall not they *teach thee* and *tell thee*, and utter words out of their hearts?" What! teach state legislators, who are pledged to *reform?* Have they not often shewn themselves able, in the words of Piorry, "*tout faire, tout casser, tout briser, tout renfermer, tout juger, tout deporter, tout massacrer, et tout regenerer?*"

The "improvements" of no state stand forth more prominently than those of Alabama. The system, in accordance with which their laws are made, is anarchy. The principles which govern this system are impulse, convenience, and profit, the end accomplished is the construction of certain instruments, by which the cunning and learned in the law can impose upon the straightforward, and those who govern themselves solely by the dictates of reason and common sense. The only objection which the rogue finds to Alabama law, is that of Falstaff to Mrs. Quickly: "Thou art neither fish nor flesh; a man cannot tell where to have thee."

At the very commencement of an action, we are enabled to appreciate the wisdom and justice of the law-givers. There are but two terms of the circuit and county court a year, one the appearance and the other the trial term, and but one term of the chancery court. No person can obtain a judgment, even upon a plain note of hand, until the second term after the action is commenced. The law does not afford him the power of obtaining a just debt until a year after the same is due, when it ought to enable him to obtain judgment in twenty days from the commencement of the suit, which, or even a less time is considered sufficient in some of the states. By another convenience to assist justice, a man cannot be sued, except in local actions, out of the county of his residence and freehold. (Clay's Dig. 442.) In this way transitory actions are made local; if the defendant sees fit to move out of the county where the contract was made to some extreme county of the state, the plaintiff is put to the expense of removing his evidence to that county. This law illustrates the *principles* which guide Alabama legislation, as it was framed by an individual for his own express benefit.

The number of counts allowed in the declaration of the plaintiff, and the number of actions of a different nature where one and the same count are used, which are remedied in England by the rules of Hilary term, 4 Will. IV., are very objectionable. This practice, coupled with the privilege given the defendant in this

state of pleading as many pleas as he sees fit, (Clay's Dig. 332) causes the parties to join in no real issue, and the object of all pleading to be defeated. Each party is ignorant of the grounds upon which the other party will rely. There is nothing directly affirmed or denied between the parties. Each is put to much additional labor to be ready to meet his antagonist at all points, making the practice much worse than the civil law, where each party makes a plain statement of his case at least. But here no plain statement is made. Counsel upon both sides act upon Talleyrand's principle, that "words are given us to conceal our thoughts." The statute in this state authorizing the defendant to plead as many pleas as he sees fit, makes the whole science of pleading an adjunct of fraud, and taken in conjunction with the registry law, noticed hereafter, fully justifies the remarks of Mandeville, concerning lawyers:

> "The lawyers, of whose arts the basis
> Was raising feuds and splitting cases,
> Opposed all registers, that cheats
> Might make more work with dipped estates,
> As 't were unlawful that one's own,
> Without a lawsuit should be known.
> *And to defend a wicked cause,*
> *Examined and surveyed the laws,*
> *As burglars shops and houses do,*
> *To see where best they may break through.*"

The contradictory pleas in an action of assumpsit, of non-assumpsit, payment, set-off, award and satisfaction, infancy, duress, &c. are equally ridiculous with the pleas in the old story of the person who was sued in damages for breaking a kettle which he had borrowed. In accordance with the principle which allows a multiplicity of pleas, he pleaded, "First, that he never borrowed the kettle, second, that it was broke when he got it, third, that it was whole when he returned it, and fourth, that he had already paid for breaking it."

The tenure of office and the compensation of the judges is a great injury to justice in this state. The salary of the circuit judges has been reformed down to fifteen hundred dollars, which is about three-fifths of the salary of a merchant's book keeper in Mobile. In other countries the judges have salaries somewhat in proportion to the importance of the interests intrusted to them, but here justice must be cheap, and if they cannot have a good lawyer to fill the office of judge for a small compensation, they take a poor one. The legislators have reversed the principle of Lord

Brougham, and prefer *cheap injustice* to *costly justice*. Judge Hitchcock, after his resignation, remarked that he could not serve the state as chief justice for the same price (that is, twenty-five hundred dollars) that the keeper of the mansion house paid his cook. The chancellor of the southern division, among eight hundred cases which came before him at the last term of the chancery court in the Mobile district, most of which were important, had one (*United States Bank* v. *Hitchcock*) involving eight hundred thousand dollars, and he received a salary of fifteen hundred. The same chancellor is obliged to hold court annually for twelve other districts besides the Mobile district. We leave it to others to draw inferences. The compensation of the judges is very disproportionate to the section of the country. In other states, where it costs about one-fourth as much to live, the salaries are generally higher than in Alabama. The result is, the talent of the country cannot be obtained to fill our highest offices. Economy itself may be bought at too high a price. Suppose, in reducing the salary of the judge, we have perverted the cause of justice, we have taken property from the owner and given it to the cheat, we have caused the laws to be undervalued, and thereby weakened their influence; we have brought our courts into disrespect and abhorrence, instead of honor and confidence, and we should pay our judges a high salary after all. The judge holds his office for but six years. If he desires a reëlection, as is usually the case, he shapes his course accordingly;

> "Though fraught with all wisdom he is straining his throat
> To persuade Tommy Townsend to give him his vote."

He secures the influence of the powerful in the party; in fine, he trickles and bends to popularity instead of acting the part of a firm and upright judge.

Among the alterations in law made in France and England, there are none which have been more eagerly desired, and for which more strenuous exertions have been made, than to make the laws uniform throughout the nation. Difference, not equality, is the aim of the law-makers of Alabama, as applied to different sections. Distress for rent is authorized in Mobile county, and nowhere else. In certain counties of the state, justices are allowed to hold jury courts, in others not allowed. The simplicity and uniformity of the laws are clearly shown by the limitation of actions for assault and battery in Montgomery county. The limitation of these actions, generally, throughout the state, is six months; but it was found that the intervening time between the sessions of the court

for Montgomery county was from eight to nine months. The law-givers, instead of making the sittings of the court conform to the law, adapted the law to the sittings of the court, doing away with the supremacy of law, and showing how much regard they pay to principle and constitution.

Bank corporations have been the subject of much complaint, but never has our boasted principle of equality been more disregarded in this particular than in this state. They do not even come into courts of justice upon an equal footing with individuals. They cannot be garnisheed as men. (Clay's Dig. 120.) They are not obliged to depend upon the will of the sheriff to effect service, but are authorized to employ a special agent for that purpose. They are allowed to obtain judgment, in a summary method, in thirty days, and execution may issue immediately; but the debtor must wait a year before he can collect debts due him, in order to meet the demand of the bank. In this manner the bank possesses a tyrannical power over solvent men.

Many of the modifications of law, as it regards real estate, bear upon their face proof of having been enacted to suit emergencies of particular individuals.[1] Conveyances of land registered at any time within six months from the execution thereof, are binding in law, so that the grantor may convey away land as often as he can find purchasers, if the deed is not recorded immediately after the purchase, which is very seldom the case. The object of the registry law is to give notice, so that a *bona fide* purchaser may not be cheated out of his money by buying lands which have already been sold. It is the substitute for livery of seisin. But the effect of our registry law is to do away with all notice, as it induces the first purchaser not to take the title deeds, but to rely simply upon the registry of deeds for proof of title. He leaves in possession of the grantor the title deeds, which enables the grantor to show title in himself, which title is strengthened by reference to the records; but the second purchaser has no power of ascertaining whether title has ever passed out from his grantor. This is in every respect worse than no registry; for where there is no registry, the grantee takes the title deeds, as they are the best and only proof of his title. He who has his deed first recorded, should have a paramount title to all prior unregistered deeds whatever, as in France, Scotland, a large part of England, and most of the United States.

[1] The permanence of law, in this particular, is worthy of note, as it is an instance of the immense deal of work turned off by our legislators. The time for registering deeds was twelve months, then three months, then six months, &c. There have been some dozen acts passed extending or limiting the time for registering deeds. (Aik. Dig. p. 91.)

We come next to the limitation of real actions. It was enacted by the legislature, in the session of 1842–3, that "all actions for the recovery of lands, tenements and hereditaments in this state shall be brought in ten years after the accrual of the cause of action and not after, provided that five years be allowed to infants, *femes covert*, and lunatics, after the termination of their disability to bring suits." The English law, which limits real actions to thirty years (formerly sixty) gives every individual who has a right to land, time to investigate, so that if he or his ancestors were deprived of their rights by accident or fraud, time, whose daughter is truth, *(Temporis filia veritas)* might develop it. Here, no matter how just the claim of any individual may be, if he has not the proof within ten years he is forever barred. He may have been absent from the country; he may have been in such a situation through sickness or poverty, that he could not look about for his proof; his witnesses may have been in parts unknown; papers may have remained undiscovered, yet he who is in possession of the land, without a shadow of right in reality, though he may have a shadow of title in law, is made the owner. If the person to whom the land belongs happens to be an infant, *feme covert*, or lunatic, only five years are allowed after the termination of their disabilities to bring suit to eject the wrongful possessor. Here "time, the old justice which tries all such offenders," instead of unmasking the rascal, sets him on a firmer footing, and enables him to bid defiance to justice, to common sense, to universal experience, to everything righteous, and to all law, — being sustained by the statute of Alabama. The legislators have adopted the rule of Sparta, that it is praiseworthy to steal provided it can be done without discovery, and if the thief can keep the theft undiscovered for from five to ten years, according to circumstances, he shall have the thing stolen as a reward for his cunning.

Another limiting statute of the state is made probably through benevolence, above sectional influence, for the express benefit of widows. In section 2, of an act passed in 1840, it is enacted, "that the claim to dower in this state by the widow of any grantor, who shall be a nonresident of the same at the time of conveyance thereof, shall be forever barred, unless asserted before the proper tribunal within twelve months after the death of her husband." The object of this law is evidently to deprive the widow of a nonresident of all dower in land belonging to her husband, simply because she is a nonresident; for it is almost impossible that a widow within a year after her husband's death, should be able to institute proceedings for dower in lands which formerly belonged to her

husband in another state. She is not excluded for any wrong on her part from the rights that are given to other women; no principle of public morality or state policy draws this line of exclusion; but she is deprived of the benefit of the summary law, which guarantees a widow a support from the real estate that had belonged to her husband during his life, for the grievous crime of not residing in Alabama.

Rights may have too many safeguards thrown around them, so many that very few persons will be able to overcome them in order to arrive at their own. An act was passed at the session of 1843–4, which is not so partial as the foregoing act, but which includes all widows; this law obliges the executor or administrator, executrix or administratrix, to give bond not only in double the amount of the personal estate, but in double the amount of real estate of the deceased. This grand inroad upon common law and common sense was peculiarly required from the fact, that the administrator cannot dispose of a foot of land without an order of court, and without giving an additional bond. This law seems to have been expressly passed to deprive the widow of the administration of her husband's estate, and throw it into the hands of some rich person, who can make a speculation out of the deceased's property. It has already, within the short time since it was passed, deprived worthy women of this common law right. We say nothing of the far-reaching foresight of requiring bonds for the good administration of that over which the administrator has no control.

The mercantile law, which has become among commercial nations an international law, is of universal weight and authority. Lord Brougham said "that it was as good as can be," and the report of the English commissioners upon law reform, shows that they coincide with that opinion. But the jurists of Alabama have seriously reformed it. Days of grace are allowed upon bills of exchange, and notes payable in bank only. No notes are negotiable unless payable in bank. Notice of non-payment required only on bills of exchange, and notes payable in bank. The object of these laws was probably to favor the bank. The effect is to impose upon the unwary, who think that Alabama is within the pale of those governments where the international law is obeyed. Against all other bonds, notes, &c., except those payable in bank, the defendant shall be allowed the benefit of all payments, discounts and sets-off, made, had, or possessed, against the same, previous to notice of assignment in the same, as if the same had been sued or prosecuted by the obligee or payee therein." (Clay's Dig. 382.)

Here is decidedly the greatest convenience for doing a dashing business that the invention of man has ever discovered. A, a perfectly solvent man, makes his note payable to B or order, for one thousand dollars. B, who is insolvent, contrives to owe A an amount equal to the note, B indorses the note over to C. C, after requesting A to pay the note, sues him upon it. A sets off against the note his demand against B. In this manner C is cheated out of his one thousand dollars. A and B divide the money among them. A, according to Alabama law, owes not a cent upon the note. B is utterly insolvent, and was known by C to be insolvent at the time of purchase, for C relied upon A's name alone. C has no remedy unless it is the very convenient one of proving fraud. A great amount of property has "changed hands" in Alabama in this way. Lord Mansfield applied to the commercial law the language of Cicero, when speaking of the immutable laws of justice. "*Nec erit alia lex Romæ, alia Athenis, alia nunc, alia pasthac, sed et omnes gentes et omni tempore, una lex, et sempiterna, et immortalis, continebit.*" But Lord Mansfield never foresaw the legal improvements of Alabama. Chancellor Kent speaks of the law merchant as "consisting of certain principles of equity and usages of trade, which general convenience, and common sense of justice had established." Alabama legislation has "reformed" upon general convenience and common sense of justice.

The amount of property exempt from execution in Alabama is somewhat remarkable. A man can have forty acres of land, provided the value of the land does not exceed one hundred dollars, a horse and vehicle, two cows and calves, twenty head of swine, one hundred bushels of corn, five hundred pounds of meat, one thousand pounds of fodder, all meal, all tools, including gun, and all books of which he may be possessed, besides minor articles too numerous to mention. (Clay's Dig. 210.) One could be worse off than to be a "poor man" in Alabama.

We have but one thing more to mention, and this we should be very glad to pass over entirely, and not even give it the space which we now do. The inquisition of lunacy (Clay's Dig. 302) is a great instrument of tyranny. The sheriff, by virtue of his office, is general administrator and general guardian, when no one else can give bond. The sheriff summons the jury, presides as judge over the inquest, and after the verdict of lunacy, is appointed guardian of the person and property of the adjudged lunatic. No Turkish bashaw is possessed of such unlimited power as is here given to the sheriff. Rank offences, which "cry to heaven," have been perpetrated under this law in Alabama during the last five years.

We pretend not to have gone to the depth, or even to have passed through the statute book, for the purpose of marking the exceptionable statutes of Alabama. We have not even mentioned the redemption law, the "bloody code" of criminal law, which is so universally despised by the bar and the people, and others which are equally bad. We have only spoken of those evils which affect property principally, which are most frequently met with in practice, and from which injury oftenest results. We mention them as instances of the hasty legislation of the day, of legislating for the benefit of particular individuals; as another proof of the truth of Curran's remark, that "laws may be made in the spirit of sound policy, and supported by superior wisdom, but when only half considered, and their provisions half enumerated, they become the plague of government, and the grave of principle."

Alabama is young, and is just beginning to develop its resources, both physically and intellectually. May its next effort be to do away with the endless variety, the minute details, and contradictory requisitions of her present laws, and establish in their place, a code whose distinguishing trait shall be *simplicity*, that other name for *truth*.

Recent American Decisions.

Circuit Court of the United States, Massachusetts, November, 1844, *at Boston.*

UNITED STATES *v.* CATHERINE HEWSON.

Trial for murder. The prisoner was indicted for the murder of her child, by throwing it overboard from a steamboat. It was in evidence, that she had the child on board, alive, that some minutes afterwards the child was missing, that she confessed that she threw it overboard, but said that it died in a fit, using language indicating an unsound mind. It also appeared, from the evidence of several physicians, that the prisoner had been subject to the disease called puerperal fever, and that the tendency of that disease was to produce temporary alienation of mind and derangement of the natural affections. The court instructed the jury that the burden of proof was on the government, to make out that the child was alive when thrown overboard, and that, taking into consideration the doubt upon that point, and the evident unsoundness of the prisoner's mind, the jury ought to bring in a verdict of acquittal. Verdict accordingly.

Where the secretary of a steamboat corporation was employed only for the purpose of attending to the custom-house business of the steamboat, it was held that he was the secretary of the corporation, and as such competent to take out the enrolment of the vessel within the intent and meaning of the act of congress.

An enrolment will be presumed to have been legally taken out, until the contrary is shown; nor is it necessary to prove, affirmatively, that all the individual members of the corporation owning the vessel are American citizens.

It is the practice in this court, on a capital trial, to ask each juror, before he is sworn in chief, whether he has any conscientious scruples as to finding a verdict of guilty in a capital case.

The right of peremptory challenge is limited to twenty.

MURDER.—The indictment contained two counts, the first charging the prisoner with the murder of her child (a female infant) on board the steamer Massachusetts, on the passage between New York and Boston, on the night of July 30, by throwing it overboard; the second charging the prisoner with the murder of a child, (not alleging it to have been her own.) At the commencement of the trial, the counsel for the prisoner claimed the right of peremptorily challenging thirty-five jurors, but the court ruled that the right was limited to twenty. The district attorney suggested that each juror, before being sworn in chief, should be asked whether he had any conscientious scruples as to finding a verdict of guilty in a capital case. STORY J. said this had been the practice in this court for the last twenty-five years, ever since the escape of two of the most atrocious men he ever knew in Rhode Island, through the scruples of two jurymen. Accordingly, as each juror was called, the question proposed was asked by the district attorney. Three jurors declined being sworn, from conscientious scruples, and were set aside by the court. The prisoner challenged nineteen jurors peremptorily. The evidence in the case was substantially as follows:

Captain Joseph Comstock. The steamer Massachusetts, in July last, was in the employ of the New Jersey Steam Navigation Company. She was plying from New York to Stonington, across the Sound. I do not remember having ever seen the prisoner at the bar, before the present time. On the evening of July 30, I was called about 12 o'clock at night, by the second mate, and told by him that there was a child missing, and that it had probably been thrown overboard. We were then nearly opposite the mouth of the Connecticut river, and off Saybrook. This was about two hours before we arrived at Stonington. I do not recollect the weather. I was then above, in the wheel-house. I went below to inquire into the facts, and was shown a woman, who, they said, had had a child, which

could not be found. I do not remember the number of deck passengers. There were a considerable number; I should think not less than twenty-five. The deck passengers remain, during night, in the forward part of the main deck. They are not allowed to go aft, or on the upper deck, or in the cabins. They are obliged to remain in a space ninety feet by twenty-eight or thirty, under cover. Large doors lead to the forward part of the deck, which part is not under cover. The latter is fifty-eight feet by thirty-three, thirty-four or thirty-five. The bulk-head goes to the bows of the boat. This is taken up with freight, cattle, horses, &c., if there are any, chains, anchors, and various lines, ropes and other articles. The bulwarks of the open part are four feet high. I was shown a woman sitting down, covered with a cloak. I asked her if she had had, or then had, a child. After various inquiries, to which for some moments she made no reply, she said that she had had a child, but had eat it up. I set her in a private room, near by, with a man to watch her. Some moments before we arrived at Stonington, the woman sent for me, and said she had made away with her child by throwing it into the sea. At the same time she stated that it was a poor weakly child, subject to fits, and she was a poor destitute woman, unable to take care of it. That was all that was said, except that I put her in charge of a man and woman, who seemed to have some charge of her, the woman having previously tended her child, and who said they would have her arrested on arrival at Boston or Lowell. I do not know that that woman was or was not the prisoner at the bar. I cannot identify her as any person that I have seen before. A thorough search was made for the child at the time. (By Story J.) The Sound is about nine miles wide in that place. We were five miles from one shore and four from the other, when I first received the information. The information was given very shortly after the child was missing.

Cross-examined. At that time I had some conversation with the passengers. I might have said that the woman was insane, out of her head, or in liquor, and probably did. I cannot say, positively, what I did say. My impression at the time was that she was out of her head. I stated other reasons that might have influenced her. I supposed she was in liquor until I examined her; but after examining her, I did not think so. She was confined nearly two hours. I confined her because many people were crowding around her, and there was great excitement manifested about the case, among those on board. My object was to protect her from harm or annoyance. It was not a bad night. I think it did not rain. I do not know who instituted this prosecution. I did not advise those

people to do it, who appeared to have the care of her. I probably should, if those people had not taken her under their charge. Darwin F. Rockwell is the permanent secretary of the corporation in New Jersey, and was at that time. They have a secretary in New York. Rockwell lives in Jersey city. I think his only business relates to custom-house papers. I think he has no books or papers, except those relating to custom-house business.

Direct resumed. The nature of the act, as being done by a mother to her child, led me to suppose that she was in liquor or insane. I saw nothing else except her saying she had eat the child, to induce me to suppose so. I made the observation while I was talking with her. I noticed nothing else showing alienation of mind or insanity. I do not personally know the extent of Rockwell's duty.

Captain William Comstock was then sworn, and testified as follows: I reside in New Jersey. I am agent in Providence of the New Jersey Steam Navigation Company. This boat is owned by and was built for that company.

Cross-examined. I am general agent at Stonington for this end of the line.

James Simpson. I was a passenger together with Catherine Hewson, the prisoner at the bar, on the night referred to. I passed the night on the forward deck, under cover. I was a deck passenger. It was dark that night, and I could not identify her face. I saw her next morning, and the prisoner is the person. We were sitting two or three yards apart. My wife was with me. My wife sailed for England October 8. I saw a woman sitting on a trunk; she had a child; the child appeared cross. I saw her take some clothing from the child and put it into the trunk, and take some from the trunk and put it on the child. I think it was under clothing. I saw the child myself. I heard it cry. It appeared about a month or six weeks old, from the size of it. After that, she walked up and down the deck, trying to pacify the child. She had it on her lap. I could not say whether she was nursing the child or not. I had no conversation with her before or afterwards. She walked up and down for a few minutes. This was in the dead of the night. She then either went out of my presence, or I went out of her's, I don't know which. I think I went aft, towards the engine. I was walking about. I did not at that time go forward. I next saw her, about a quarter of an hour after. She still had the child. She was in about the same place as before. I think the child was peaceable then. I think we were both walking up and down for some time. She was afterwards out of my presence for some time. I heard a rumor that she had thrown her child overboard. I saw her, but did

not hear her say anything to me. To others she said it was none of their business. She had not then her child with her. I did not hear any one ask her questions, nor hear her say anything to anybody. I saw the captain asking her questions, but did not hear what they said. I saw the woman in the morning, sitting on the opposite side of the steamboat to me. When the rumor went that the child was thrown overboard, I went up to her, and saw the woman. It was the same woman that I saw the next morning, after daylight. I recollect now that I was in another steamboat when I saw her next morning. I was crossing in the ferryboat in the morning. That woman that I saw in the morning is the prisoner. I do not recollect that I saw any horses on board the steamboat that night. I did not hear the woman herself say "It is none of your business."

Cross-examined. I rather supposed, at the time that she had the child in her lap, that she was nursing it. In the ferryboat in the morning she was sitting by herself. I should think, from the child's crying, that it was well. It cried strong. I could see the child's face. It looked healthy enough from where I was sitting. I think the clothing taken from the trunk was a diaper.

James Gay. I live in Boston. I belong to Harnden's Express. I was on board the steamboat Massachusetts on the night of the 30th of July last. I did not see the woman at night, I saw her the next morning. The prisoner is the same woman. I saw her on board the steamboat Massachusetts, and in the ferryboat. She was in a different car on the railroad track. I had no conversation with her. The baggage was on the forward part of the main deck. I believe there were horses on board. I would not swear positively that there were. We arrived about 2 o'clock at Stonington.

Cross-examined. We carry horses so frequently, that I cannot recollect positively respecting that time. I think I saw horses there, but am not positive enough to swear to it.

Patrick Carigan. I am a catholic. (STORY J. remarked, that some four or five years ago, a witness was brought on to testify, who was a catholic, and a Bible was sent for, which should be certified by the bishop to be a correct version, according to the doctrine of the catholic church. The bishop said, that an oath on a protestant Bible was equally binding, or indeed an oath taken in any other way. He gave, however, his certificate in writing, that the copy produced was the version used in the catholic church, and the witness was sworn thereon. In the present case, the witness was sworn in the usual way, neither counsel making any objection.) I consider an oath administered in the usual form, equally binding with an oath upon the Bible. I was on board the steamboat Mas-

sachusetts on the same passage with the prisoner. I saw her along side of the same steamboat in New York. This was about five o'clock, the day I went on board. I don't know whether she had a child or not. She appeared to have something in her arms. I had no conversation with her then. I saw her next, some time in the night. I don't know whether she had a child with her or not. I saw her have a child in her arms, and heard the child. She had on a big cloak. The child was crying. I spoke to her before I heard the child. She asked me how far it was before we got into the cars. I told her I did'nt know exactly. I asked her next why she was sitting out there alone. She was sitting outside, on the part of the deck which was not under cover, by herself. I asked her why she did'nt come in. The weather was fair — cold, but not very cold. She said she was'nt cold. I neither saw nor heard the child at that time. She asked me if I was going to Boston; I told her yes; that I had lived in this country four or five years. She asked what kind of a place it was about serving girls. I told her the price was from a dollar up. I asked her if she had any friends there. She said her husband was in Boston for four or five years. I asked her in what street did he live. She named some place that I did'nt know anything about. I asked what did he do. She said he worked along shore. Then I asked her how long since she left Ireland. She said she was in Ireland ten weeks ago. At this time I heard the child cry. Says I, "what! have you got a baby?" "It's none of your damn business," says she. I then moved away from her. She got mad. I saw two or three women coming towards her, and they came and asked her to go inside. A little while after, she did come in. She sat down on a trunk, pulled her cloak around her, and gave the child the breast. I saw her nurse the child. The child was crying all the time, and a woman alongside of her said she would take the child; she did so, and gave it her breast. The prisoner then took off her hat and cloak, and fixed up her hair. This woman that gave her the breast said she took hold as good as her own child, that was five or six months old. The prisoner said, before the woman took the child, that it had fits. The people gathered round. Some said it looked sick. The woman gave her back the child, after nursing it. It began to cry again soon after. One woman said she had one which was sick, just like this one, and that it took the breast a little while before it died. The prisoner walked about with the child, and walked up among the baggage. After a while, I don't know how long, she walked out forward. She stopped out there about twenty or thirty minutes. I was then outside of the sheltered part of the deck. A parcel of us gathered

up to see what she was out there for, where there were horses and such things. She had the child after she went out. We remained inside of the baggage cars, between the cars and the uncovered place, and remained there till she came back. She went out forward as far as she could go out. There were horses there. When she came from forward, a woman asked her to let her see her child. She said it was sleeping, and she did not know why every one made themselves so uneasy and sick about her child. She had her arms in the same way as when she carried the child out. She came in, and we insisted that we should see the child. She said she had given it to a woman, a friend of hers, down in the cabin. There was no woman down there. I did not see, but others went down to see. She had not the child there. They opened her cloak, and pulled her hands apart, and everything. A number of women came and inquired about the child. She was mad, and would hardly give any answer, and what she did was not very civil. Then the captain came round and asked her. She made no answer, until he had asked a good many times. The captain asked her, did she stow it away anywhere. She made no answer. He then searched, and found nothing. He cameba ck and shook her by the shoulder, and asked her what she had done with the child. Says she, "I eat it." He then walked away from her, and said he would have her secured. She then got up, and said the child died in a fit, and that she hove it overboard. Some one told the captain that she would throw herself overboard. She kept moving about, back and forth, as if she meant to go overboard. One of the men kept by the side of her to take care of her. This was in the night time. Some one said it was between nine and ten. One of the captain's men said it was between ten and eleven. She was then put into the cars. There was no moonshine, but there was a lantern near where she sat. I heard her tell some folks that the child was three weeks old, and tell others that it was only eleven days old.

Cross-examined. I was born in Ireland, in the county of Linegal. I first came to this country six years ago, nearly seven years ago. I arrived at St. John's. I have lived thirteen months at the corner of Battery and Commercial streets, Boston. I lived in Philadelphia three years. I worked in a junk store in Boston, for Mr. Phillips. I have a family. When I took passage on board the steamboat Massachusetts, I intended to go to Ireland. I did not intend to take my family, nor to stop long. I could not get a chance to go. I saw this woman walking about on the dock some time in New York. I saw no child with her. She kept her arms

out with the cloak over them. I do not know how long it was after I went on board that I first saw her again. A little more than two hours I should think. I went on board a little after five. I first saw her sitting alone. I saw her a good while. I saw her all the time afterwards, till she went forwad. Nothing was said about going to see what she was doing out there. We heard the child cry, when she went out, and did not hear it when she came back. Before she came back, some said she was out there for no good purpose. I do not remember whether I have now testified to more than I did before the commissioner. She offered the child her breast, but the child did not take her breast. She held the child to her breast but a few minutes. This was soon after she came in. She went out soon after the other woman gave the child the breast. I do not think she treated the child so well as I have seen my wife treat a child. I did not testify before the commissioner that she treated the child kindly. I did not use any language improper or insulting to her. I do not know who told the captain about her. I asked no person to look at the woman. I did not point out the woman to any one. In the cars, I told her she would be put in the state prison. She appeared not like other women in her manner and the use of her tongue. Since I have been in Boston, I have been doing nothing a part of the time, and a part of the time at work in a junk store. I have been in jail. I cannot tell what for. I was in the cell No. 21. I had no conversation with the prisoner there, except when she spoke over from her cell. She spoke first. She kept dancing and hollering. I told her, only once, that she would be dancing and hollering over South, before long. I told her I would do all I could against her. I did not say I would swear hell against her. I said I would do all I *knowed* against her, but not all I *could*. Her first answer when she came in from the forward part of the boat was, that the child was asleep, and that she did not know why they should be so uneasy about her child. I so stated before the commissioner. I think so, but am not certain. She told the captain that the child had fits, and died of fits. He was near enough to hear her. She got up and told him so. The man who had charge of her walked with her back and forth. I can't say how long, or how many hours. It was not one hour.

Direct resumed. The woman and the darkies who were in jail kept *hollering* to me, which made me say what I did to her at that time.

Captain Comstock, recalled. I directed the woman to be put into a little room, or a kind of gangway between two rooms, not

more than four feet square, where there was a chair for her to sit down. This was immediately after I examined her, as I before stated. I did not know that she walked about, afterwards, at all. I directed a man to stand at the door, and keep watch of her, and let no one speak with her. I supposed my directions were complied with. I will not swear that she did not walk about.

Derastus Clapp. I am a constable in the city of Boston. On the 30th of July last I was at the Providence depot on other business. In consequence of what was said to me there, I took the prisoner into custody. The prisoner stood near the baggage car, with others. She had a ticket for her baggage. I requested the baggage-master to take charge of her baggage, which she had pointed out to me as hers. She inquired if it would be safe. I told her it would. I then requested her to walk with me. She came with me, without replying. While going to Charles street, I said to her, "How came you to be so foolish as to throw your child overboard?" Her answer was, "It was dead, sir." I asked her how it came dead. She said it had fits. In another conversation afterwards, she said the child had spasms. I told her that it was improper to throw her child overboard if it was dead, without letting any one know it. She said that she had known others to do it; and I understood her to say, that she had known others to do it on her passage to this country, when their children were dead. I cannot give the precise words of this answer. I asked her how long she had been in this country. She said about a fortnight; and that she came in a vessel to New York; that she belonged in Ireland, in the county of Cork. She said that her husband had been from Ireland about nine months; and that he had sent for her to come to this country. I asked her where she was going. She said she was going to Mobile to find her husband. I informed her that she had come two hundred miles out of her way. I inquired of her whether the child was male or female. She said it was a female, and that it was born on the passage, about three weeks previous. She stated that she had no acquaintances or friends that she knew of in this part of the country. That is all that I recollect. My reason for asking her these questions was, that I arrested her without a warrant. She said that her husband's name was John, with the same name which she gave as her own, and that he was a laborer. I have not seen her since, till I saw her on the examination before the commissioner.

Cross-examined. I think three or four persons spoke to me at once to make the arrest. Several persons pointed her out to me.

I think, as we went across the Common, that she said she felt weak and faint. I think she sat down on one of the benches. When she said the child had spasms, she said it had them a great deal of the time, or frequently. She made no complaint about my taking her into custody. I thought she appeared stupid or indifferent.

Before opening for the defence, the counsel for the prisoner stated the point which they should take respecting the jurisdiction of the court. It was argued that the national character of the vessel must be made out. A competent enrolment was necessary, to make out the national character of the vessel. The acting secretary was not competent to take out the enrolment, as he had since continued to be secretary only for the purpose of taking out custom-house papers. The counsel referred to *Hosea* v. *Buchanan*, (16 Peters, 215). The point taken by the counsel respecting the ownership of the vessel was this. It does not appear, affirmatively, from the evidence, that the individual corporators are American citizens. The corporation is one acting under an act of the state of New Jersey.

On these points the court ruled against the defendant, and said that it would be presumed that the enrolment was legally taken out until the contrary was shown.

J. P. Putnam opened for the defence, and after dwelling upon the danger of trusting to circumstantial evidence, the necessity of caution in receiving confessions as evidence against the prisoner, and the principle that the confessions, if introduced by the counsel for the prosecution, must be all taken to be true, unless contradicted by other evidence, and incompatible therewith, stated that the ground of defence would be, that the child had been previously unwell, that it died of sickness, and was by the mother committed to the waters of the Sound, and that the mother was laboring at the time under a partial aberration of mind.

Dr. Horatio Stone. I reside in New York city. I am a physician. I saw the prisoner on the 20th of July last. I was called to see her professionally in the afternoon of that day. I went to the house, in Washington street, New York, at the house of Mr. Nixon. I found she had been delivered of a child, and, as I was told, about an hour before I arrived. I found her laboring under strong symptoms of fever, and nervous agitation; her pulse small and quick, throbbing of the temporal arteries, tongue thick and coated, tenderness, on pressure, of the abdomen, and distention of the abdomen. The symptoms were those which precede puerperal fever. The placenta had partly passed away, and a portion

remained in the vagina. There was a diseased state of the uterus, and the placenta was also in a diseased state, the consequence of which would be imperfect nutrition to the child. The room was a small one, with but one small window, in which were two beds, and a quantity of clothes and baggage. She was lying on a poor apology for a bed, composed partly of her own trunk and clothing. I could obtain but little information from her. I could with difficulty obtain any reply to my questions. She was suffering much from pain. There was apparent congestion about the brain. The child appeared weak and shrivelled, much less vigorous than children usually are. I think I visited her only twice. I visited her the second time about sixteen hours after the first visit. The symptoms of the mother were nearly the same, but rather aggravated. It was stated that the dispensary physician had been spoken to, and would attend to her, and that she would be unable to pay any fee for medical attendance. The accommodations were very bad, the air very close and warm, and the room filled with the unpleasant odor of foul clothing. The people there appeared to be attending her as well as they could. Puerperal mania is a frequent attendant of puerperal fever. It usually deranges or destroys the moral sense or natural feelings. It sometimes comes on three or four days, and sometimes a fortnight after the birth of the child. It sometimes comes on suddenly. It is not uniform in its appearance or duration. It may disappear within twenty-four hours after its coming on. Some of the symptoms are like those of other kinds of mania, such as reasoning from wrong premises. Other symptoms are perversions of the moral sense and the natural feelings. A mother who had a tender heart, and an affection for her child, would, immediately after the appearance of the mania, deny the child to be hers, wish it to be dead, or perhaps try to kill it; but on the disappearance of the symptoms, she would caress it with fondness. Such cases have come under my own practice, and are also laid down by distinguished physicians. There was some discharge from the eyes of the child. They were evidently diseased.

Cross-examined. Puerperal mania differs from other species of mania in being temporary and more uncertain. I think it produces a temporary congestion of the brain, but not organic disturbance. The mania tends more to disturb the moral sentiments than the intellect. It would be likely to recur after an interval of ten days. I observed no specific disease in the child, which would show a complaint inherited from the mother.

Dr. Thomas M. Cocke. I reside in New York. I am a physi-

cian there. I am connected with the lying-in hospital. I was called last summer to see a woman at Mr. Nixon's, Washington street, New York. I went at the request of some one. I went up stairs and saw a woman lying on her back with her eyes closed. I could get no reply from her. Her eyes were closed, pulse accelerated, tongue coated. The symptoms threatened puerperal fever. The room was small, confined, littered with bedding and other articles. The child was wrapped up, and had pueral ophthalmy, a species of sore eyes peculiar to infants. I do not recollect to have seen that woman afterwards. I directed that she should be removed to the almshouse, and gave a certificate for that purpose. Such certificates may be given by any physician, and they are submitted to the commissioner of the almshouse. Puerperal mania is a very common attendant of puerperal fever. There are two forms of puerperal mania; one is temporary, and soon passes off; the other, usually, is developed two or three days after, and sometimes later. Diseased placenta would occasion a child to show the effect of imperfect nutrition. The skin would be shrivelled. Improper nutrition to infants tends to occasion convulsions.

Cross-examined. Puerperal mania may assume any form which other mania does; I do not think that it has any symptoms peculiar to itself. Nursing by a woman who has a child some months older, usually occasions convulsions. This is an established principle. I would not allow a woman with older milk to nurse a young child in any case where I had anything depending upon it. A child dying in convulsions does not usually make any noise.

Abraham Nixon. I live in 152 Washington street, New York. I recognize the prisoner as a woman who was at my house last July. I called Dr. Stone to see her. I found her at a store in Washington street, near the Troy steamboat landing. A stranger called at my house, and directed me to her as a person who wanted to get boarded. I took her to my house. She remained from a week to ten days. The child was born at my house. Myself and wife, another person and his wife, and this woman occupied one room. A second doctor called afterwards. She went from my house on board the steamboat Massachusetts. The stranger who called at my house wished me to go to the store to find the woman.

Cross-examined. The man who came to me told me the woman came in the Troy boat. He did not tell her name. I did not know him. He said he knew me.

Dr. O. W. Holmes. I am a physician of this city. Children a short

time after birth are frequently subject to convulsions. The nine days disease received that name at the time of a general epidemic in Dublin hospital, which carried off a great number of infants. Want of air, want of care, want of cleanliness, are among the causes. Young children are more subject to the disease than older children. Experienced persons cannot tell, from the appearance of a child, as to its robustness at birth, whether it would be subject to convulsions. Inward fits is a term frequently used by uneducated or less discriminating persons. It is frequent among the Irish. The term is by them applied to different kinds of convulsions. There is a form of fits which appears to be characterized by spasms of the heart. It is sometimes followed by complete recovery, sometimes by death. Some internal malformations occasionally prove fatal to children, at the end of several days after birth. Among these are obstructions in different parts of the alimentary canal. These would not be likely to cause sudden death. Other internal malformations might, and might not be attended with convulsions. There are cases where children lie torpid, in a state resembling death. The symptoms of puerperal mania vary very much, from violence to simple wandering. This form of mania may take all the symptoms of other mania. It lasts sometimes, but rarely through life — sometimes for weeks and months. Still more rare are cases lasting for about twenty-four hours. The causes of this mania cannot be assigned with any certainty, with the exception of pregnancy. Nursing by a woman with an older child would not usually be considered dangerous. There exists a strong prejudice against it, however.

Dr. Walter Channing. Puerperal fever arises from a great variety of causes, such as inflammation of the bowels, inflammation of the uterus, and other kinds of excitement. Dr. Channing described the symptoms and course of this fever at some length. The woman is apt to lose her interest in her child, and is absorbed in the contemplation of her own sufferings. There is then an entire absence of maternal feeling.

Cross-examined. I cannot say that the existence of diseased placenta in the mother, would naturally occasion convulsions in the child.

At this stage of the cause, Mr. Dexter, upon a suggestion of Story J., proposed to the prisoner's counsel, that the cause should be submitted to the jury without argument, upon the charge of the judge, it appearing, from the nature of the evidence adduced in behalf of the defendant, that a conviction could not probably be had. To this proposition the prisoner's counsel assented. All the witnesses on the part of the prisoner were not examined.

Franklin Dexter, District Attorney, for the prosecution.
Charles B. Goodrich and *John P. Putnam*, for the defence.

Story J. in his charge to the jury, adverted to the evident facts, that the woman was not in her right mind, and that her answer that she had eat her child, showed that her reason was not in operation for any useful purpose. He also commented upon the absence of any motive for the crime, the previous sickness, weakness, fever, and excitement of the prisoner, the probability that her mind was diseased, her situation among the deck passengers on board a steamboat, in the night, poor, destitute and friendless, the doubt whether the child was not dead before it was thrown overboard, and the burden upon the government to make out the case beyond a reasonable doubt; and intimated very decidedly that there was no ground for convicting the prisoner.

The jury, without leaving their seats, rendered a verdict of not guilty.

Circuit Court of the United States, Southern District of New York, June, 1844, *at New York.*

In the matter of John A. Barry.

The circuit court of the United States has not jurisdiction, either by common law or by statute, of a petition for a *habeas corpus*, in order to take a child from the custody of the mother, and deliver it to the father.

If such jurisdiction were to be implied, the decision of the court of errors of New York supplies the rule of law, which the circuit court for the southern district of New York would consider the rule of decision in the case.

By the decision of the court of errors of New York, the father is not entitled, on the case made by this petitioner, to take the child out of the custody of the mother.

The fact that the petitioner is an alien, cannot vary his rights in the case, but he must take his remedy according to the law of the court, without regard to the law of his allegiance.

This was a petition to the circuit court for a writ of *habeas corpus ad subjiciendum*, to be directed to Mary Mercein, relict of the late Thomas R. Mercein, of New York city, and to Eliza Anna Barry, wife of the petitioner, directing them to produce the body of Mary Mercein Barry, daughter of the petitioner, by them imprisoned or detained. The petitioner alleged, that he was a resident of Nova Scotia, and had never been naturalized in the United States; that in April, 1835, he married his present wife, the daughter of the late Thomas R. Mercein, in New York; that in May, 1835, he

went to Nova Scotia with his wife, and resided there about a year; that he then removed to New York, and remained until April, 1838; that he then returned to Nova Scotia, where he has since continued to reside, with a portion of his family, leaving his wife and two children temporarily with her father; that his wife afterwards refused to return to Nova Scotia, and that the petitioner, after some fruitless negotiation, allowed her to remain with her father, and retain their daughter, Mary Mercein, until May, 1839; that then, finding it vain to attempt to induce her to return to his home, he formally demanded his daughter, but his demand was not complied with; that his daughter is now in the seventh year of her age; that Mercein has lately deceased, and that the petitioner's wife has no means of support known to the petitioner; that she resides with, and is harbored by her mother, Mary Mercein; that the petitioner is able comfortably to provide for the support of his daughter, and that she is a British subject, owing allegiance to the crown of Great Britain, at least during her minority. The petition also set forth many other matters of aggravation.

This subject had previously undergone a searching discussion, before various tribunals of the state of New York. Two of the local judges and the chancellor on these facts allowed a writ, but refused to award the custody of the child to the father. (8 Page, 49.) The supreme court, on full discussion, adopted a different conclusion, and by two solemn decisions, adjudged that the father, under such a state of facts, was by law, entitled to the custody of an infant child. (25 Wend. 80; 3 Hill, 405; 3 Law Reporter, 315.) These judgments of the supreme court, were reviewed on error, in the court of errors, and both reversed by that tribunal. (25 Wendell, 106, M. S. S. Ap. Session, 1844.) The supreme court based their decisions upon the doctrines of the common law, and not upon the terms of the Revised Statutes. (2 R. S. 466, s. 23.) The substance of the enactment is, that a *habeas corpus* shall issue, on the application of any person (by petition signed by himself, or *another* in his behalf) "committed, *detained*, confined or *restrained* of his liberty, for any criminal or supposed criminal matter, or under *any pretence whatsoever*." (2 R. S. 466, s. 23, 25.) It appears, therefore, to have been decided by the court of errors, that the keeping of an infant female child, under seven years of age, from its father by the mother, living separate from him, and who has it in her nurture, is not, in the judgment of the law, a detention or restraint of the liberty of the child, and that the father is not, by writ of *habeas corpus*, entitled to have such possession of the mother adjudged illegal, nor have the custody of the child awarded to him.

A petition was presented to the supreme court of the United States, at the last term, substantially the same with the present, and was supported by an elaborate argument on the part of the petitioner. Upon that petition the court observed, "it is the case of a private individual, an alien, seeking redress for a supposed wrong, done him by another private individual, a citizen of New York," and say, "it is plain therefore the court has no original jurisdiction in the case," and remark, "without therefore entering into the merits of the present application, we are compelled by our duty to dismiss the petition, leaving the petitioner to seek redress in such other tribunals of the United States, as may be enabled to grant it. If the petitioner has any title to redress in these tribunals, the vacancy in the office of judge of this court assigned to that circuit and district, [southern district of N. Y.] creates no legal obstruction to the pursuit thereof."

Betts J. delivered a long and elaborate opinion, in which it was considered, that the supreme court of the United States had not expressed a decisive opinion, that the circuit court had jurisdiction of the matter; that the decisions of the court of errors, are, within the state of New York, obligatory to the same extent as enactments by positive law, and supply evidence of great weight and cogency as to what the law of the state is; that the alienage of the petitioner would not vary the principle, even if it be conceded that by the laws of his domicile, he is entitled as absolutely to the custody of his infant children, as to that of his estate; and that nothing is clearer in international law, than that a party prosecuting, must take his remedy in accordance with the law of the court, and without regard to the law of his allegiance. He concluded by saying that he should deny the writ of *habeas corpus* prayed for, because, (1.) If granted, and a return was made admitting the fact stated in the petition, he should discharge the infant, on the ground that this court cannot exercise the common law function of *parens patriæ*, and has no common law jurisdiction over the matter. (2.) Because the court has not judicial cognizance of the matter by virtue of any statute of the United States. Or (3.) If such jurisdiction is to be implied, that then the decision of the court of errors of New York supplies the rule of law, or furnishes the highest evidence of the common law rule, which is to be the rule of decision in the case; and (4.) Because by that rule the father is not entitled, on the case made by this petitioner, to ke this child out of the custody of its mother.

Petition denied.

District Court of the United States, Massachusetts, October, 1844, *at Boston. In Admiralty.*

HOWLAND AND OTHERS *v.* 210 BARRELS OF OIL, &c.

The rule allowing a moiety to salvors in cases of derelict, is not inflexible.

Under the extraordinary circumstances of this case, considering the desperate situation of the property, abandoned by the crew, at a distance of one thousand miles from any country where assistance could be procured, the great risk incurred in saving it, the forfeiture of insurance by the salvors, and the nature of the voyage, it was decreed, that the salvors should receive $5,740,36, and the claimants $1000.

THIS was a libel for salvage. It appeared that the ship London Packet sailed from New Bedford on the 24th of November, 1841, fitted for a voyage of three and a half years in the sperm whale fishery. On the 18th of August, 1842, having taken one thousand barrels of sperm oil, she discovered the wreck of the whale ship Benezet, on a reef about forty miles from the Fejee Islands, a place dangerous to navigation from sands, calms and currents. The captain of the London Packet, hoping to save the crew, went in his boat to the wreck, and at some hazard succeeded in getting on board. None of the crew were found. He took some coils of warp from the wreck, and returned to his own ship. On the two following days he boarded the wreck again, and took some articles of her apparel. He cut a hole through the deck in order to take oil from the hold, but without success, and cut away the masts in order to prevent her going to pieces. On the night of the 20th the wreck went to pieces, and the next day the crew of the London Packet picked up about two hundred and twenty-four barrels of oil, and some sails and rigging, adrift from thirty rods to a mile from the reef. The following night the ship in a calm was carried by the swell and current within twenty or thirty rods of the reef, and was relieved from her perilous situation by the springing up of a breeze. The salvors described the weather, after the discovery of the wreck, and before picking up the oil, as rough and squally.

Having been carried by the current some distance from the wreck, the London Packet beat back in two or three days, and took some other articles from the remnants of the wreck. On the 27th they picked up at sea a cask of oil containing six barrels. On returning to the reef about the 3d of September, no vestige of the Benezet or cargo remained.

The captain and crew of the Benezet reached the Bay of Islands,

New Zealand, about a thousand miles distant from the wreck, in a whale ship called the Hoogly; at what time did not distinctly appear, although there was evidence tending to show that it was in the month of August. The master, after advertising ten days, sold the Benezet and cargo at auction, for the sum of fifty-five shillings sterling. The London Packet arrived at the Bay of Islands about the 18th of October following. The purchaser was then preparing to send a small schooner to the wreck, but, upon information then received, abandoned the enterprise.

The London Packet arrived at New Bedford on the 27th of June, 1844, with two thousand one hundred and fifty-five barrels of sperm oil, including that which had been picked up. She could have carried about two thousand two hundred barrels. She was insured for the voyage at six per cent. for three years, and pro rata for a longer time, and, at the time of the salvage, was, with her cargo, worth $40,000.

Coffin, of New Bedford, for the libellants.

Page, of New Bedford, for the claimants.

Sprague J. in giving judgment, stated that although, in cases of derelict, a moiety only is generally given to the salvors, yet this rule is by no means inflexible. It yields to extraordinary circumstances. In this case should be considered on the one hand, (1) The desperate situation of the property; deserted by the master and crew of the Benezet — the Hoogly not choosing to go to the wreck to endeavor to save anything, although she took up the master and crew; the trifling sum for which the Benezet and cargo were sold by the captain's order, at public auction, after advertising ten days — the distance of the wreck from any country where assistance could be procured, being about one thousand miles — while the vessel and cargo actually went to pieces and disappeared. (2) The meritorious conduct of the salvors, in boarding the vessel for the humane purpose of saving life, and the personal hazard incurred by the master and crew. (3) The risk of the London Packet and cargo while rendering the salvage service. (4) The forfeiture of her insurance, the new insurance for the residue of the voyage being worth four or five per cent. on $40,000, equal to $1600 or $2000. (5) The situation of the London Packet, the nature of her voyage, the place she was in, her prospects of obtaining a cargo from whales, being then twenty-one months out, on a voyage for three years and a half, having already taken one thousand barrels of oil, on whaling ground, and with good prospects.

On the other hand, (1) That not more than one-tenth or one twentieth of the vessels engaged in the business get full cargoes; the average being about two-thirds of a cargo. (2) That they actually returned, having been three years and seven months out, with two thousand one hundred and fifty-five barrels, including the property saved, while they could have carried forty-five barrels more, and, if they had been able to take more, might have sent these casks home by another vessel. (3) That time and expense would have been required to take the same amount of oil from whales.

The court then adverted to the opinions of a number of witnesses which had been given in evidence, as to the amount which would be a just compensation for salvage; and proceeded to say, that although it had been suggested that the oil was sold on the arrival of the vessel, and brought ninety-two cents a gallon, the salvors had no right to sell, and there was no evidence that they had sold. The marshal's return showed it to be in custody. It was therefore to be estimated at the market price, which was proved to be ninety-six cents per gallon. The oil, calculated at six thousand seven hundred and forty-one gallons, at ninety-six cents, would amount to $6,471 36, and the other articles saved, estimated at $269, would make the amount $6,740 36.

In conclusion, the court said, on consideration of the circumstances, particularly the desperate condition of the property, the remote part of the world where it was found, the nature of the voyage of the London Packet, the actual hazard incurred, the forfeiture of her insurance, on so large an amount of property, a case was presented requiring a wide departure from the usual rule of a moiety, and decreed $1000 to the claimants, $5,740 36 to the salvors.

Supreme Judicial Court, Massachusetts, October, 1844, *at Boston.*

COMMONWEALTH *v.* FITZGERALD, IN THE MATTER OF LUCAS.

Under the statute of the United States of 1837, slaves cannot be enlisted in the naval service.

It seems that in a state where slavery is permitted, the United States may make a contract for the employment of a slave, which will be binding in that state, but cannot be enforced in a state where slavery does not exist.

Where the master of a slave places him on board of a United States vessel, and the vessel comes into the port of a free state, the slave cannot be restrained of his liberty.

Whether if a vessel, conveying slaves from one slave state to another, should be cast away on the coast of a free state, the slaves would become free — *quære.*

The purser of the frigate United States, by the leave of the secretary of the navy, took on board that ship his slave in the port of Norfolk, Va., the slave was entered on the muster roll, and his master drew his wages. The frigate being ordered into the port of Charlestown, Massachusetts, it was held that there was no law to authorize his restraint.

Robert T. Lucas, a colored man about forty years old, was brought before chief justice Shaw, at Chambers, on October 11, by a writ of habeas corpus. He was taken from the frigate United States, commanded by Captain Stribling, then in the port of Boston. The following facts appeared on the hearing. Fitzgerald, who was a purser in the navy, and going out in the United States, obtained the following authority from the secretary of the navy, to take Lucas with him.

Navy Department, 26th October, 1841. Sir — Your letter of the 18th instant has been received. The department grants your request to be permitted to take your own servant with you on board the frigate United States. I am, very respectfully, your obedient servant. A. P. Upshur.

Purser Edward Fitzgerald, U. S. ship United States, Norfolk.

Fitzgerald accordingly took Lucas on board the frigate with him, and had him entered as a landsman. It was proved that Lucas went on board voluntarily, which was not disputed. The frigate, in January, 1842, sailed for the Pacific, and was attached to the squadron there, where she remained until ordered by the commodore to Boston, at which port she arrived October 3d, it being the first port in the United States which she had entered since her departure. Lucas was never regularly enlisted, but was entered on the muster roll as a landsman, drawing wages at the rate of nine dollars a month, which were claimed and received by Fitzgerald as his owner. He was under the command of Captain Stribling, as much as any one on board, and his duty was to wait on Fitzgerald and another officer as their servant. This was according to the usual practice of the navy; and if Fitzgerald had not taken his slave, another person, paid by the United States, would have performed the same services. Lucas having expressed a desire for his freedom, two of his shipmates, who were discharged on their arrival at Boston, gave the information under which the habeas corpus issued.

B. F. Hallett, for Captain Stribling and Purser Fitzgerald, contended that Lucas was lawfully entered in the service of the United States, that his enlistment was a valid contract by the law of Virginia, where it was made: that the going out of the limits of that

state, and an involuntary entering into Massachusetts, did not invalidate that contract; and that he therefore might be held here as lawfully in the service of the United States. He further urged that, if the agreement to enter on board the ship as one of the crew was not originally valid, still that the slave was brought here without the consent of his master, who therefore had the right of necessity to carry him through Massachusetts to his domicil in Virginia: that this was a case not covered by the decision in the *Commonwealth* v. *Aves*, (18 Pick.) in which the court pointedly waive giving any opinion in regard to a slave involuntarily brought here, or landing from a vessel necessarily entering our ports, or driven in by stress of weather.

Sewall and *Merrill*, on behalf of Lucas, insisted that the contract of enlistment in this case, was made by Lucas's master on his own account, not for the benefit of his slave: that Lucas, being a slave under the authority of his master, and therefore incapable of giving any legal consent to a contract, his going voluntarily on board the ship would not make the enlistment his act: that under the constitution, the United States could not lawfully employ a slave: but if they could in any case do so, they could not lawfully enlist a slave in the naval service, as it was clear that the statute only authorized the enlistment of free persons. St. U. S. 1837, ch. 389, s. 1. But if Lucas was legally enlisted, still the United States could only acquire, under the contract with his master, the rights which his master had. Though Lucas was a slave in Virginia, the instant he was out of the jurisdiction of Virginia on the open sea, he became free, and the United States could have no further claim on him under the contract with his master. When his master placed him in the naval service of the United States, he thereby consented that he should go anywhere that the ship might be lawfully ordered to, and took the chance of his being sent to a free port. Fitzgerald having thus consented to his slave's coming into Massachusetts, the case could not be distinguished from those of *Commonwealth* v. *Aves*, (18 Pick.) and *Commonwealth* v. *Taylor*, (3 Met. 72.) The consel contended that the English common law, which declares every man free coming on British soil, was in full force in Massachusetts, except so far as it was modified by the provision of the constitution of the United States, for the surrender of fugitives from labor, which provision, being in violation of justice and humanity, was to be construed in the strictest manner.

Shaw J. C. gave an elaborate opinion, of which the following is only an abstract. Under the statute of the United States of 1837,

slaves cannnot be enlisted in the naval service of the United States. When the statute, after authorizing the enlistment of boys, says that "it shall be lawful to enlist other persons," it must mean free persons, for the enlistment is a contract, and none but a free person can enter into a contract. Slaves can make no contract. Lucas's going voluntarily on board the ship, did not alter the case, for he was still a slave, and therefore under the control of his master. In the eye of the law he could have no will of his own.

I cannot assent to the suggestion made by Lucas's counsel, that the United States cannot, under the constitution, lawfully employ a slave. In a state where slavery is permitted, they can make any contract for the employment of a slave, which is legal in the state where it is made. But under such a contract, they could acquire no greater right over the slave than the master himself had, and no greater right than any private person could acquire by such a contract. Even supposing, therefore, the contract made by the government with Fitzgerald, for the employment of his slave, was valid in its inception, yet as slavery is local, the instant the frigate went out of Virginia, the slave became free, and Fitzgerald's authority over him as master ceased, and of course the authority of the United States over him, which depended on Fitzgerald's, ceased at the same time. The claim of captain Stribling to hold Lucas as a person in the United States service, is therefore not supported.

Nor can the claim of Fitzgerald to hold Lucas as his slave, be sustained. He voluntarily put his slave on board a United States vessel. By so doing, he consented that the slave should be carried anywhere that the ship might be sent to, by the lawful orders of the government; and if she was sent to Boston, that he might be carried there. It is not a case of *vis major* or irresistible necessity in any just point of view. Whether if a vessel, conveying slaves from one slave state to another, should be cast away on the coast of a free state, the slaves could be retained, is a question not now presented. It is clear that this is not a case of a person held as a slave in one state escaping into another, so as to come within the provision of the constitution. Where a slave is in Massachusetts casually, not being a runaway, whether he is brought here voluntarily by his master or not, there is no law here to authorize his restraint.

As therefore Lucas is not lawfully enlisted in the United States service, and cannot be held here by his former owner, he must be discharged.

Lucas was accordingly discharged.

District Court, Eastern District, State of Maine, at Bangor, October Term, 1844.

STATE *v.* STINSON.

A witness was rejected on account of atheistical opinions entertained several months before the trial. Subsequently, evidence was offered to show a change of sentiment. *Held* to be competent, and the witness was admitted to testify.

INDICTMENT for larceny. The government offered the complainant as a witness, who was objected to on the ground that he did not believe in the existence of a Supreme Being. The defendant introduced a witness by whom it was proved, that Kensell said that he did not believe in the Supreme Being, six or seven years ago. Also, by another, that he did not believe in a Supreme Being, in 1840; and again, in July or August, 1843. Also, by another witness, that he had heard him two or three years ago say the same. The defendant's counsel read ch. 115, sec. 72, of the Revised Statutes of Maine, which is as follows: "No person who believes in the existence of a Supreme Being shall be adjudged an incompetent or incredible witness in any judicial court, or in the course of judicial proceedings, on account of his opinions in matters of religion, nor shall such opinions be made a subject of investigation or inquiry."

Parks and *Ingersoll*, for the state.
Kent and *Cutting*, for the defendant.

ALLEN J. after argument on the point, ruled that the witness was incompetent, and refused to admit him to testify.

The next morning the prosecuting officer asked leave of the court to open the matter again, and to hear evidence to show a change of opinion on the part of the witness, which, after argument, the court permitted, and thereupon the government introduced witnesses on this subject. One testified that in April or May last, he heard the offered witness say, that he believed in the universal salvation of all, and that we had a just and not an unjust Maker who ruled over us. By another witness, that about a fortnight before he had a conversation with him on subjects of religion, and asked him if he believed in a supreme being. He said, he certainly did. He said, he believed in the salvation of all men; he professed to be a Universalist. By another, that he professed to be a Universalist, and that he said he believed God was a God of justice. The defendant introduced another witness, who said he

had a conversation with the offered witness about a year since, in which he asked him if he did not believe we were accountable beings for our good and evil, he said he did not; asked him if he believed in the Bible, he said he did not; said we had no right to consider any belief or accountability except the things present.

Upon this evidence the court admitted the witness.

Supreme Judicial Court, Massachusetts, November Term, 1844, at Boston.

CHARLES H. PEABODY *v.* WILLIAM P. WINCHESTER AND JOHN R. BRADLEE.

In trespass for an assault and battery, the defendant offered in evidence a libellous attack on himself and family in the plaintiff's newspaper; *held*, that this was not a justification, and the plaintiff was entitled to recover the actual damages sustained; but beyond this, it was proper for the jury to take into consideration the conduct of the plaintiff in publishing the article, and the probable effect of the publication on the defendant's feelings.

TRESPASS for an assault and battery, alleged to have been committed in April, 1843. The plaintiff was the editor of a newspaper called the Bulletin, in the weekly edition of which there was an article which the defendant, Winchester, considered as reflecting upon himself and family. The article was published on Saturday. On the Monday following, the defendants went to the office of the plaintiff, and Winchester made the assault complained of, after some conversation respecting the authorship of the offensive matter. As to the precise character of the assault, there was some discrepancy; but the father of the plaintiff, who was present, testified that Winchester called on the plaintiff at his counting room, and asked him whether he was the author of the piece in the paper entitled "Marriage in high life." The plaintiff replied that he was not; and, in reply to another question, he said that he did not know who was the author. After a little more conversation, Winchester struck the plaintiff several blows, knocking him down on the floor and striking him several times while lying prostrate. Bradlee, according to this witness, stood in the door-way during this transaction. It also appeared, that the plaintiff was confined to his house a fortnight after this, and was in ill health for some months, being at one time delirious. He gave up his paper in August following, and subsequently went to England, where he was again

delirious and was sent home. He has since recovered and is out of the country. It appeared that the plaintiff was a very small man, and had been previously insane.

On the part of the defence, it appeared that the plaintiff had announced in his paper his intention to publish an account of the marriage of Mr. Winchester's daughter, and although requested by a friend of the family to say nothing more about it, he persisted in his plan, and did publish what purported to be a full and detailed account of the wedding, in a manner and style which made it apparent who was intended. The second article, which was the immediate cause of the assault, did not contain the name of Mr. Winchester; but his counsel contended that it referred to him plainly enough, and was so understood by the writer, the editor and his readers; and that it was calculated to hold Mr. Winchester up to public ridicule and contempt. Evidence was also offered to show, that the plaintiff had expressed a determination to publish whatever would cause his paper to sell, without regard to the feelings of others, and that he had declared a week before the publication, that the paper containing this article "would sell like hot cakes."

The counsel for the defendants moved for a separate trial, in order that Mr. Bradlee might be a witness in the case of Mr. Winchester, but the court ruled against the motion.

J. C. Park, for the plaintiff.

C. G. Loring and *D. S. Greenough*, for the defendants.

Wilde J. instructed the jury that where a defendant failed to prove a legal justification for an assault, the other party was entitled to recover the actual damages. In this case, if the plaintiff had made a libellous publication respecting Mr. Winchester, the latter had his remedy in an action; but the publication did not constitute a valid justification for the assault. Consequently, the plaintiff was entitled to recover all the actual damage he had received; and in determining what this was, the jury were to consider not only the personal injury inflicted, but the injury done his feelings. Beyond the actual damage — that is, as to *smart money* — the jury were to take into consideration the conduct of the plaintiff, the nature of the article complained of, and the natural resentment which it was calculated to produce. Upon the whole, as an assault was both admitted and proved, the plaintiff was entitled to whatever *actual damages* he had suffered, without any regard to the article in the newspaper. But beyond this, all the circumstances of the case were to be taken into the account, — the conduct of the

plaintiff, the nature of the publication, and the provocation, if any, which was given when the assault took place.

The jury returned a verdict of $213 33 against Winchester, and acquitted Bradlee.

Superior Court, city of New York, November, 1844.

MATTER OF SAMUEL ADAMS.

Fugitives from justice; — Construction of Article 4, § 2, of the Constitution of the United States, and of the Act of Congress of 1793.

HABEAS CORPUS. It appeared that the prisoner, Samuel Adams, and one Richard Seymour were, in the month of June last, indicted for obtaining money by false pretences of Suydam, Sage & Co. of New York city. Adams is, and always has been, a resident of the state of Ohio. On the 6th day of July, 1844, and after he was indicted in New York, the governor of the state of New York issued a requisition to the governor of Ohio for the apprehension and delivery of Adams and Seymour to A. M. C. Smith and David Greig, agents of the state of New York, to receive them. Smith and Greig repaired to Ohio, and on the 20th of July, 1844, the governor of Ohio issued his warrant or precept to the sheriff of Ross county, (being the county in which Adams resided,) commanding him to deliver Adams and Seymour to Greig and Smith, as such agents of the state of New York. On the same day, or a very few days after the warrant of the governor of Ohio was issued, the sheriff of Ross county apprehended Adams, and delivered him to Smith, who hurried him out of the state of Ohio, with a precipitancy that indicated his determination to avoid, if possible, obstruction there from *habeas corpus*, or otherwise. Seymour was not taken, and the governor of Ohio afterwards countermanded and revoked the order for his surrender. Adams was brought to the city of New York, where the offence, in one count of the indictment, at least, was alleged to have been committed. On the 30th of July, he was brought before Judge Daly, of New York, on *habeas corpus*, and entered into a recognizance, with sureties, to appear and answer the indictment in the court of sessions, and was, thereupon, discharged from custody. Afterwards, and on the fourth of November, his bail surrendered him to the keeper of the city prison. While he was there in custody, and on the

same day the *habeas corpus*, hereafter mentioned, was allowed by Judge Vanderpoel, the court of sessions made an order for his commitment, though he was not brought into court, nor did it appear that he had any notice of such proceeding before the allowance and service of the *habeas corpus*.

The prisoner claimed to be discharged on the grounds, (1.) That he was a citizen of the state of Ohio; that he was not a fugitive from justice, and that the governor of the state of New York had no right to make his requisition for him, and the governor of Ohio had no right to issue a warrant for his surrender, and that the governor of this state had no sufficient evidence before him to sustain the issuing of his requisition. (2.) That the court of sessions had no jurisdiction over the person of the defendant, or the subject matter of the prosecution; because Adams was not in the city or state of New York, when the alleged offence was committed, and never committed any offence in the city and county of New York. (3.) That he was virtually kidnapped, and that it was the duty of the court to discharge him and give him safe conduct out of the state.

Wood and *Morris*, for the defendant.

Whiting, contra.

The opinion of the whole court was delivered by

Vanderpoel J. As the questions involved were questions of great interest and importance, and the amount alleged to have been obtained by the prisoner by his false pretences was very large, I requested my associates to sit with me and hear the arguments of the learned counsel, both in support and in opposition to this application. They have conferred with me in relation to it, and performed that advisory office which the counsel for the respective parties consented that they might perform. I am now about to announce the conclusion at which we have arrived. It appears that the prisoner was in the city of New York in the month of March last, which was some months after the offence, if any, was committed. He came here on a bridal excursion, accompanied by his wife, and his brother and sister. He made an appointment on that occasion to meet Mr. Sage, one of the members of the firm alleged to have been defrauded, at six o'clock in the afternoon of the day he left the city; and instead of fulfilling this engagement, he left town in the five o'clock train for Philadelphia, without sending or offering at the time any apology for not performing his engagement. Mr. Sage testifies that their house

intended, at that time, to have him arrested for the alleged fraud committed against them. He further states, that they had discovered from Mr. Adams himself while in the city in March last, that the property, on the strength of which the drafts were drawn, never had been in the possession of Seymour, and that they then intended to arrest him, if they could get at facts in the case sufficient to warrant such arrest. Edward Adams, to be sure says, that his brother did not leave the city in much of a hurry, that he did not go away in order to avoid being arrested; but left to transact some business in Philadelphia, to try and raise some money there.

The second section of the fourth Article of the Constitution of the United States provides, that "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state, having jurisdiction of the crime." Congress, as early as the year 1793, passed an act to carry out this provision of the constitution, which provides that "whenever the executive authority of any state in the union, shall demand any person as a fugitive from justice, of the executive authority in any state or territory to which such person shall have fled, and shall, moreover, produce a copy of the indictment found, or an affidavit made before a magistrate of any such state or territory, charging the person so demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged fled, it shall be the duty of the executive authority of any such state or territory to which such person shall have fled, to cause him or her to be arrested and secured, and delivered to the executive authority making the demand or his agent."

Was the prisoner in point of fact, here a fugitive from justice, within the contemplation of the act of congress and the constitution? For the purpose of arriving at a conclusion in this case satisfactory to our own minds, we have not deemed it necessary to decide, whether we can on *habeas corpus* look behind the acts of the executive authorities of Ohio and New York; whether we have a right to determine the sufficiency or insufficiency of the evidence upon which they acted; whether the proceedings before judge Daley, did or did not constitute a bar to the object now sought at my hands. We think here is enough in the case to justify the detention of the prisoner, without deciding these grave and elaborately mooted questions. Admitting, for argument's sake, (but for

no other purpose,) that I can on *habeas corpus*, look behind the acts of the governors of the two states, and inquire whether there was sufficient ground to authorize the requisition of the one, and the surrender by the other, we have come to the conclusion, that the conduct and sudden departure of the prisoner, when here in March, may place him in the character of a fugitive from justice; and if it were a nearly balanced case as to whether he was or was not such fugitive, I would not, after indictment and the adjudication of the executive authorities of two states, feel inclined to overrule their acts and discharge the prisoner. He was here, in March, within the jurisdiction of the state of New York and the court in which the bill of indictment was found against him. He departed under circumstances which might induce a jury to conclude that he left the state for the purpose of avoiding a prosecution then in contemplation against him. He may have left for the purpose stated by his brother; but from the non-fulfilment of his engagement to meet Mr. Sage at six o'clock of the day on which he left, a jury might infer that he left to avoid the effect of proceedings, which Mr. Sage says their house thought of instituting against him. If, therefore, it were competent for me to look behind the acts of those high functionaries whose decisions I am virtually called upon to overrule, and make an independent inquiry into the point, whether he was in point of fact a fugitive from justice, I would not now assume the responsibility of saying that he was not one. If a citizen of a state, having offended against the law of another state, according to the allegations contained in the indictment in this case, shall voluntarily come within the state and county where the offence was committed, and prematurely depart thence for his home with the view of avoiding arrest and prosecution here for the crime, I have no hesitation in saying that such an one is a "fugitive from justice," within the constitution and the act of congress. So, if a man within a state secretly commits a crime, and suddenly departs — the crime not being discovered till months, or if you please, a year after his departure: though he may have left for purposes other than the fleeing from the justice of the state against which he offended, yet he surely might be treated and proceeded against as a fugitive from justice. The consciousness of his having committed the crime, of his being amenable to the laws of the state, against which he offended, might and would properly be regarded as the motive for going out of its limits, and form a legitimate basis for an executive requisition and surrender. After the governor, in the case just stated, should have proceeded against the offender as a fugitive from justice, I would not be inclined to speculate upon the

probability of his having left the state, for purposes other than to avoid the penalties of its violated justice. Under the evidence in this case, I would not, if I had power to look into this case, without regard to any previous executive action thereon, take the responsibility of saying that the prisoner was not a fugitive from the justice of the state of New York. I therefore refuse the application for his discharge, and order him to be remanded.

Supreme Judicial Court, Massachusetts, October, 1843, *at Worcester.*

WATERS *v.* RANDALL.

A conveyed several tracts of land to B, by an absolute deed, and B at the same time gave a bond to A, conditioned to reconvey the lands to him, on his paying B certain sums due to him from A, and saving him harmless from certain liabilities assumed by him for A: The value of each tract of land was estimated in the condition of the bond, and it was also therein provided that A should remain in possession of the lands, and receive the rents and profits thereof, so long as he should save B harmless, &c. It was also provided, in the condition of the bond, that B, if he should be obliged to meet and discharge the liabilities incurred by him for A, might take possession of such portion of said lands, according to such estimated value, as should be equal to the debt or liability so discharged by B: B was obliged to pay a certain sum for A, and thereupon brought a writ of entry, in the supreme judicial court, to recover certain parcels of said lands, equal in value, according to said estimate, to the sum thus paid by him. *Held*, that the deed and bond constituted a mortgage, and not a conditional sale, and that as the writ of entry (according to *Ingalls* v. *Richardson*, 3 Met. 340,) was to forelose a mortgage, the court had no jurisdiction of the case.

E. Washburn, for the plaintiff.

T. C. Bacon, for the defendant.

Superior Court, New Hampshire, County of Grafton, July Term, 1840.

PHELPS *v.* WORCESTER.

Where suit was brought by direction of the guardian of an infant, to protect the infant's title to his estate — *Held*, that the counsel could not recover for services and expenditures in such suit against the infant, but that suit must be against the guardian.

Such services and expenditures are not regarded as necessaries, and may be avoided by the infant even under an express promise.

An infant is liable to his guardian solely on a decree of the probate court, on an adjustment of his guardianship account. — 11 *N. H. R.* 51.

Digest of American Cases.

Selections from 6 Watts and Sergeant's (Pennsylvania) Reports.

ACT OF ASSEMBLY.

An Act of Assembly will not be construed to repeal by implication an express enactment, unless there be a clear and strong inconsistency between them. *Street* v. *Commonwealth*, 209.

ASSIGNMENT.

The retention of the possession of goods by the assignor, after a voluntary assignment in trust for creditors, with the permission of the assignee or his vendee, does not make the transfer of the goods fraudulent *per se*. *Dallan* v. *Fitler*, 323.

ATTORNEY.

An award of money by the commissioners under the Spanish treaty, excluding such persons as are not citizens of the United States, does not exclude an attorney in a foreign country, who for advances and services there has a lien on the fund claimed and awarded. *Aycinena* v. *Peries*, 243.

BANKRUPT.

The confession of a judgment to a creditor with a view to prefer him, is not invalid by reason of the provisions of the Bankrupt Law, if it be not voluntary, but the effect of measures taken by the creditor or in his power to take; and it is incumbent on the party who seeks to defeat the transaction, to show clearly that it is voluntary. *Haldeman* v. *Michael*, 128.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

An action was commenced by summons on Saturday, the 1st day of January, 1842, against the drawer of a promissory note dated 30th December 1840, and payable twelve months after date. *Held*, that the action was prematurely brought, the last day of grace (which was Sunday) not having fully expired before the writ issued; and that an offer in the court below to confess judgment to the plantiff, upon terms not accepted, did not cure the error. *Thomas* v. *Shoemaker*, 179.

2. A month, in bills of exchange, notes and other mercantile contracts, means in all cases a calendar and not a lunar month. *Ibid.*

3. The parties to bills of exchange or promissory notes, entitled to claim the days of grace, have title to them as matter of right. *Ibid.*

4. In a suit by the holder against the maker of a negotiable note, the plantiff cannot be called on to prove the consideration between himself and the payee, unless it be shown that the note was obtained or put into circulation by fraud or undue means. *Brown* v. *Street*, 221.

5. If a note falls due on a Friday, and notice of non-payment is not received by the indorser until Monday following, it would be too late if the parties lived in the same town; but an affidavit of defence must in such case state the residence of the maker, so that it may appear notice could have been regularly received in a shorter time after demand there of payment. *Moore* v. *Somerset*, 262.

6. In a suit against the indorser of a note, he must set out affirmatively in his affidavit of defence, sufficient to show negligence in the plantiff in not giving him due notice. *Ibid.*

7. The indorser is bound to know the residence of the maker of a note, and in his affidavit of defence must state at least his belief in regard to it, and that he would be able to prove it to the satisfaction of a jury. *Ibid.*

8. Notice dated Rochester, New York, Dec. 28th, 1841, of protest on that day for non-payment by drawee of a bill of exchange dated at New York, was sent to New York, where it was mailed on 3d of January 1842, and on the

4th was delivered in Philadelphia, where the drawer resided, to a person of the same name, and did not reach the drawer until the 8th. *Held* sufficient notice to charge the drawer. *Jones* v. *Wardell*, 399.

9. Reasonableness of notice to the drawer of dishonor of a bill is a question for the court. *Ibid.*

CERTIFICATE OF DEPOSIT.

An instrument in writing issued by a bank, signed by the assistant cashier, "I hereby certify that C. T. has deposited in this bank, payable twelve months from 1st May 1839, with five per cent. interest till due, per ann. $3691.63, for the use of R. P. & Co., and payable only to their order upon the return of this certificate," is not a promissory note within the statute of Anne, but a certificate of deposite on special terms. *Patterson* v. *Poindexter*, 227.

2. Such instrument is negotiable for the purposes of transfer only, but not to make R. P. & Co., liable on their indorsement to the holder. It is a special agreement to pay the deposite to any one who should present the certificate and the depositor's order. *Ibid.*

CHARITABLE. USES

The conservative provisions of the statute 43 Eliz., relating to charitable uses, are in force in Pennsylvania. *Zimmerman* v. *Anders*, 219.

COMMON CARRIER.

The responsibility of a carrier upon the Ohio river, does not cease upon the delivery of the goods on the wharf, and notice given to the consignee; but it is his duty to attend to the actual delivery. *Hemphill* v. *Chenie*, 62.

2. Common carriers may, by special contract, limit the extent of their responsibility for the safety of goods delivered to them to be carried. *Bingham* v. *Rogers*, 495.

3. In an action against a common carrier to recover the value of goods delivered to him to be carried, the owner of the goods, being the plantiff in the action, is not a competent witness to prove the contents of the trunk or the value of the articles which it contained. *Ibid.*

CONSIGNOR AND CONSIGNEE.

There is an implied engagement by a consignee with the public, that he will be vigilant and careful in receiving and forwarding goods intrusted to his care; and upon his refusal to receive goods consigned to him, he would be liable to an action by the owner for any loss which might be occasioned thereby. *Hemphill* v. *Chenie*, 62.

2. A consignee, in whose hands goods are placed to be sold, may set up the consignor's want of title as a defence to an action for the price of them. *Floyd* v. *Bovard*, 75.

CONTRACT.

A firm being large dealers in watches and jewelry, and having at all times a large stock on hand, accepted an order to pay $100 in watches, or a watch, as may suit a purchaser. *Held* that the necessary presumption was that it was the understanding of the parties that they would satisfy the order out of their stock of watches on hand when the order should be presented, and that the holder had no right to insist on a description of watches which the firm happened not to have at the time, and could only procure by sending elswhere. *Maule* v. *Pleiss*, 381.

COSTS.

One who merely takes an active part in carrying on a suit in the name of another, is not liable to the plantiff's witnesses for their daily pay and mileage, without an express promise to pay. But he is liable without such promise, where he projects and institutes the suit in another's name, and is the active agent in having it brought. *Utt* v. *Long*, 175.

2. A witness may bring suit for his daily pay, &c., against the party who supœnaed him and who lost the cause, without having the bill of costs taxed and making demand before suit brought. *Ibid.*

DEPOSITION.

Where a party notifies a justice of the peace that a deposition is to be taken before him on behalf of the opposite party, and the justice, at his request and in his absence, puts certain questions to the witness, he shall not allege want of notice. *Barnet* v. *Shool Directors*, 46.

EQUITY.

The Act of Assembly conferring on

the courts chancery power in certain cases, does not oust the jurisdiction of the common law courts exercising equity under common law forms. They are concurrent remedies, and a plaintiff may elect either. *Aycinena* v. *Peries*, 243.

EVIDENCE.

The testimony of a deceased witness, which has been taken on the trial of another action between the same parties or those under whom they claim, about the same subject matter, may if proved by the notes taken of it at a trial, be given in evidence to establish the facts then testified to. *Moore* v. *Pearson*, 51.

2. Upon an objection to evidence, the court will not stop to hear the testimony of the objecting party as a ground to sustain their objection. *Ibid.*

3. In an action of ejectment, it is competent for the plaintiff to give evidence of the declarations of one who was a joint claimant of the land in dispute with the ancestor or alienor of the defendant respecting the boundary of it, that being a point material to the issue. And upon such evidence being given, it is not competent for the defendant to prove the declarations of the same person made at a subsequent period, and after suit brought, having a different tendency. *Ibid.*

4. If a witness be out of the state, notes of his testimony, proved to have been correctly taken upon a former trial of the cause, may be read in evidence. But if it appear that the witness absented himself from that trial before he was fully examined, his testimony given cannot be read in evidence. *Noble* v. *M'Clintock*, 58.

5. In an action against a bank, declarations by the cashier or teller respecting the genuineness of certain checks purporting to have been drawn by the plaintiff, made at a period subsequent to their presentation, are inadmissible to affect the defendants *Bank Northern Liberties* v. *Davis*, 285.

6. Book entries of the whole number of pieces of paper delivered by a paper-hanger to his journeymen, made at the time of such delivery, and of the number of pieces actually consumed, the price of each with the price of hanging it and the gross amounts, made when the quantity was ascertained by hanging, though three or four days after the first entry, are evidence. *Koch* v. *Howell*, 350.

7. Upon the second trial of a cause, in which a former judgment has been reversed, the counsel of either party has a legal right to read the opinion of the supreme court to the jury. *Noble* v. *M'Clintock*, 58.

FRAUDULENT CONVEYANCE.

A conveyance by a father to his sons in consideration of an agreement on their part to pay his debts, is not fraudulent or void as to the creditors of the father. *Pattison* v. *Stewart*, 172.

HUSBAND AND WIFE.

Where the husband lives in the same city as the wife, and the wife contracts debts for shopkeeping, and the husband and wife are living separate, the husband and wife are not suable. *Jacobs* v. *Featherstone*, 346.

2. Even if they were necessaries furnished, and the husband were liable, the wife cannot be joined as defendant in the suit. *Ibid.*

LIMITATIONS.

The acknowledgment of a debt is evidence of a promise; but to avoid the Statute of Limitations it ought to be plain and express, and beyond all doubt. It is not sufficient if it is merely an inferential promise not to plead the statute made without consideration; nor where it is a disclaimer after suit brought and judgment recovered of an intention to plead the statute, accompanied by an allegation that the judgment entered was for too much. *Gilkyson* v. *Larue*, 213.

PARTNER.

The rule, that all who participate in profits are liable as partners, is subject to many exceptions. If three enter into an agreement, by the terms of which one is to do certain things and the other two certain things, each at their own expense, and each to be entitled to an equal share of the profits arising out of the subject matter of the contract, this does not constitute them all partners and make them all liable for expenses incurred by either in the performance of their part of the contract. *Heckert* v. *Fegely*, 139.

2. A partner may bind his copartner by a contract under seal in the name

and for the use of the firm in the course of its business, provided the copartner assents to the contract previously to its execution, or afterwards ratifies and adopts it; and this assent or adoption may be by parol. *Bond* v. *Aitkin*, 165.

3. The bond of one partner taken at the time money is loaned to the firm, and as the consideration for such loan, is an extinguishment of the debt, and not a collateral security. *Ibid.*

4. One partner may maintain *assumpsit* against his copartner for contribution, where he pays a partnership debt more than six years after a general assignment by the firm in trust for creditors, and the defendant gives no evidence to show that the partnership accounts are open and unsettled. *Brown* v. *Agnew*, 235.

5. A judgment obtained by one firm against another, each of which is constituted in part of the same members, some of them being both plantiff and defendant, cannot be executed by a levy upon the separate property of an individual member of the defendant firm. *Tussey* v. *Church*, 465.

PRINCIPAL AND AGENT.

A factor who sells the goods of his principal, consigned to him for that purpose, and takes the notes of the vendee, which he has discounted for his own accommodation, thereby becomes responsible for the amount of the sales in the event of the insolvency of the purchaser. *Myers* v. *Entriken*, 44.

2. An agent having undertaken gratuitously to collect a note and book-account, surrendered them to the debtor, from whom he took a new note to himself for their amount: *held*, that this was an extinguishment of the original debt, and the agent was liable for its amount to his principal. *Opie* v. *Serril*, 264.

3. In a suit by a principal abroad against his factor here, seeking to charge him with losses occasioned by his negligence, the defendant cannot, to show he had kept the plaintiff informed of his doings, give in evidence a deposition stating that the defendant gave the witness particular instructions to see the plaintiff and inform him of the state of his consignment particularly, and the sales made, when the witness states he had no copy of account sales, and showed none to the plaintiff, and sales had long before been made of which no account had been sent. *Brown* v. *Arrott*, 402.

4. A factor is liable for a loss arising from his neglect to keep his principal informed of matters material to his interests. *Ibid.*

5. Evidence is not admissible on the part of a factor, in a suit by the principal against him founded on the factor's negligence, to show that it is not usual for factors to transmit to their principals moneys received by them as long as any part of the consignment remained unsold, or if sold, as long as any part of the moneys remained unpaid, though the honesty of the agent is not disputed, and there is no ground to believe the moneys might thereby be lost. *Ibid.*

6. A factor is bound to remit to his principal the moneys received from sales of a consignment, unless there be an agreement or custom of trade, and if the latter be himself the factor of a principal abroad, he is bound to call on his factor in this country to transmit moneys received when he is informed of it, and if the money is lost by neglect to do so, he is answerable. *Ibid.*

7. In October or November 1822, the defendant was apprized of a sale by his agent in Boston, payable in February or March. In May the defendant wrote, stating he expected an account and remittance. Six days after he wrote that he need not make a partial remittance, but to push the sales to a close and remit the whole at once. In March the agent acknowledged to him his inability to meet a note to the defendant, payable in a few days, and no advice was sent by the defendant to the principal abroad till the agent became insolvent. *Held*, that the defendant was responsible for the loss of the goods and moneys. *Ibid.*

8. Where, on the facts presented, the defendant is liable for a loss occasioned by his negligence as a factor, the onus of proving what the actual loss was, lies upon him and not on his principal, and in the absence of such proof the full value of the goods, or a least of the money produced by their sale, is the measure of damages. *Ibid.*

9. The factor sold goods to J. F. on a credit of six months, taking a note payable to himself, including in it a debt owing to himself, and afterwards

released to J. F. and came in under his assignment. *Held*, that he made the debt his own by blending it with his own money, and releasing J. F. without authority. *Ibid.*

10. The relation which exists between a notary and the holder of a negotiable note, with regard to the protest of the note and notice to the indorsers, is that of principal and agent, and no more strict performance of duty is required of the former than is indicated by the uniform practice of the place where the note was protested. *Parke* v. *Lowrie*, 507.

11. Partners must act with good faith towards each other, and if one of them be served with process in action against the firm, and judgment be obtained and execution levied upon the partnership property, it is his duty to give notice of it to his co-partners; and neglect to do so subjects him to an action. *Devall* v. *Burbridge*, 529.

STAKEHOLDER.

A defendant holding funds in his hands as a stakeholder, or for the benefit of others, may be sued in *assumpsit* for money had and received, and a special judgment and execution had on equity principles applied in Pennsylvania in common law forms of proceeding, and the court will control the execution of the process by ordering the money to be brought into court or otherwise. *Aycinena* v. *Peries*, 243.

2. One having funds in his hands as stakeholder or agent for others, may be sued, though he has never been called on to settle his accounts in the common pleas, and though he is administrator *de bonis non* of one from whom the funds passed; such property forming no part of the estate of the testator, and not being within the jurisdiction of the orphan's court to settle and distribute. *Ibid.*

3. Bringing suit against the personal representatives of such testator does not conclude the party interested from proceeding against the fund, inasmuch as he has two remedies, *in rem* and *in personam*, and may pursue both till satisfaction. *Ibid.*

VENDOR AND VENDEE.

A symbolical, constructive or temporary delivery of personal property is not sufficient to change the ownership as to creditors; there must be an actual delivery at the time of the transfer, and a continuing possession; otherwise the sale, although *bonâ fide*, as between the parties themselves, is fraudulent in law. *M'Bride* v. *M'Clelland*, 94.

WAGER.

Money lost by a wager upon an election, and paid over to the winner, cannot be recovered back from him by means of a foreign attachment at the suit of a creditor of the loser. *Speise* v. *M'Coy*, 485.

WITNESS.

In an action of assumpsit by three partners, in which the defendant pleads *non assumpsit*, payment and set-off, one of the plaintiffs cannot be made a competent witness by releasing after suit brought all his interest in the claim to his co-plaintiff, and paying into court all the costs of the suit which have accrued or may accrue, to the final termination of the action. *Church* v. *Hampton*, 514.

2. A colorable assignment to make the legal plaintiff a witness, does not divest his interest, and every such assignment is deemed colorable until the contrary appears. *Leiper* v. *Peirce*, 555.

3. Where, therefore, the cause of action was an account stated by the plaintiff himself, without a voucher or scrap of paper to support it, and could only be recovered by the force of the plaintiff's testimony, and the consideration was not named, and there was no atttempt to explain or rebut the presumption of collusion, it was *held*, that the plaintiff was not a competent witness. *Ibid.*

5. The cross-examination of a witness must be confined to the subject-matter about which he was called to testify; if he be acquainted with other facts material to the issue, he may be recalled by the other party, who thereby makes him his own witness, and is subject to all the rules which govern his examination. *Floyd* v. *Bovard*, 75.

5. If a witness be called and examined by the plaintiff, he may, at any subsequent stage of the trial, be called and examined by the defendant, as to any fact within his knowledge material to the defence, although he may be directly interested in defeating the plaintiff's recovery. *Ibid.*

Intelligence and Miscellany.

CANINE IDENTITY. It is stated in the Life of Lord Eldon, that he used to tell a story of a cause which was brought before him, when chief justice of the common pleas, for the recovery of a dog, which the defendant had stolen and detained from the plaintiff, its owner. There was a great deal of evidence; and the dog was brought into court and placed on a table between the judge and the witnesses. It was a very fine dog, very large and very fierce, so much so, that the judge ordered a muzzle to be put upon it. They could come to no decision, when a woman all in rags came forward, and said if the judge would allow her to get into the witness-box, she thought she could say something that would decide the cause. She was sworn, and leant forward towards the animal, and said, "Come, Billy, come and kiss me." The savage-looking dog instantly raised itself on its hind legs, put its immense paws around her neck and saluted her: she had brought it up from a puppy. Those words, "Come, Billy, come and kiss me," decided the cause. "But when," added Lord Eldon, in telling the story many years afterwards, "I was summing up, the defendant incautiously said in my hearing, 'the damages cannot be great, and them I will pay; but the dog I am determined they shall not have.' I observed upon this to the jury, and told them, that if they were satisfied that the dog belonged to the plaintiff, they might give any amount of damages they pleased, after what they had heard from the defendant. Upon this the defendant got frightened and consented to give up the dog."

Mrs. Foster. "Then what was the verdict, uncle?"

Lord Eldon. "Oh, that threat intimidated him, and he gave up the dog; the verdict was two hundred pounds, to be levied, should he again become possessed of the animal."

There is a traditionary story of a somewhat similar scene in the Boston municipal court, when Mr. Attorney General Austin was the prosecuting attorney for Suffolk. The defendant was indicted for stealing a large Newfoundland dog, which was produced in court, and to the ownership and identity of which the evidence on the part of the prosecution was positive. The defendant claimed the dog as his own, and in the course of the trial, he cried out to the dog who was standing near the jury, "Bose, my boy, roll over." Down went the dog, with a cry of recognition, to the amazement of Judge Thatcher, and the amusement of every body else. A verdict of acquittal was rendered, and the prisoner carried off the dog amidst the shouts of the multitude.

There is another dog story, which we have lately heard, and which contains some most amusing points in relation to personal, or rather, *canine* identity. A laboring man in East Boston, who was connected with the Eastern railroad, owned a dog which had been in his family ever since it was a puppy. One day it was missed, and after fruitless efforts had been made to find it, the owner supposed that it must have been stolen, and gave notice to all the laborers, agents and conductors on the railroad to that effect. Now, it happened that a man in Charlestown had in his possession a dog, which he declared he had owned a long time, but which the East Boston citizen vehemently protested was the identical dog which he had lost. After much dispute, the East Boston claimant determined to enforce his rights at law, and an action of *trover* was brought in the justices court of Boston. On the day of trial the parties and all

their personal friends appeared, together with the dog, which the Charlestown claimant produced securely fastened by a chain. There was great conflict in the testimony. It was clear, that each party had owned *a* dog, and equally clear that the two dogs were very similar — the same general appearance — the same expression — and what was strange, the same tricks. At length the counsel for the plaintiff exclaimed: "May it please your honor, the dog is present, and we propose that he should speak for himself."

Under which king Bezonian, speak or die!

The court gave little heed to this, but the plaintiff himself taking the hint, said to the dog; "Rollo, do you want to go home?" "Bow, wow, wow, yow," barked the dog, in a style of the utmost familiarity. Now, although this testimony had not been ruled in, yet like the evidence of some other witnesses when objected to, it *was* in, and would undoubtedly have had an effect. But in this stage of the proceedings, the defendant's counsel incautiously remarked, that the plaintiff could only recover, at the extent, twenty dollars, and the dog would remain in the defendant's possession. The plaintiff, all unlearned in the law, and little knowing of the distinction between *trover* and *replevin*, was highly indignant; nay, he seemed rather disposed to rebuke his own counsel. "The money is no object," he exclaimed in a whisper, "but the dog I must have." Thereupon, his counsel in a somewhat indiscreet manner, informed the court that he would become non-suit in order to commence an action of replevin for the dog himself. Nothing could have been more unfortunate than this declaration, for it happened that the defendant had a brother present, who was going to sea in a vessel which was to sail the next day from Portsmouth, N. H., and to him the defendant committed the dog, in order that the replevin writ might not be served.

It happened that the sailor started for Portsmouth with the dog, over the Eastern railroad, and as we stated before, the plaintiff had given notice to all the conductors on that road that his dog was stolen. Thus, it came to pass, that the man was regarded somewhat in the light of a thief by these persons. But he made out to satisfy them until he arrived at Newburyport. Here, while standing on the outside of the car, with the dog secured by a chain in his hand, at the depot, one of the railroad people stepped up, and taking hold of the chain, coolly said, "I won't trouble you to carry that dog any farther."

"I don't ask you to trouble yourself at all, and will thank you to let go this chain."

"Sir," was the reply, "that dog is stolen, and I shall take him from you."

Hereupon a struggle ensued, and all three came to the ground. Meanwhile the cars set off at full speed. "This is pretty well," said the sailor; "I should like to know how I am to get to Portsmouth to-night; and my ship sails to-morrow?"

His captor informed him, that he could not get to Portsmouth that night, and offered to take him to a tavern. So the two men and the dog got into the wagon, but the railroad man, instead of going to the tavern, drove to a justice of the peace, where he entered a complaint against his companion as a thief, alleging that he found in his possession this dog, which had been stolen, and which he had known for several years! The justice accordingly made an examination.

"Your name, young man?" he demanded. The sailor, thinking this a very pretty joke, answered, "Justice."

"Your surname?"

"Cash," was the reply.

"Justice Cash," wrote down the magistrate. Now, this was so obviously false, that, taken in connection with the other facts proved, the magistrate did not hesitate to order the prisoner to give bail for his appearance at the next court for stealing; and for want thereof committed him to jail.

Meanwhile the Charlestown claimant went to Portsmouth to see his brother off, but as the ship had sailed, he presumed all was right, and it was not until he was returning to Boston, that he saw in the cars a man with the identical dog which he supposed had gone to sea. But this was not the worst of it, for he also found out that his brother, instead of being at sea, was in Newburyport jail, where he had been for several days, reflecting, probably, upon the vanity of human expectations. He came out on bail, and his first act was to bring an

action against the railroad attaché for trespass and false imprisonment. Eminent counsel have been retained on both sides, and we may expect to hear from the matter again. The dog, we will add, is in possession of the East Boston man.

Law Magazines. The American Law Magazine for October has at length reached us. The editors state that the delay of the number was occasioned by waiting for the usual materials from which they had been accustomed to make up their digest of English cases, from the pages of the London Law Magazine. As that Magazine for August had not made its appearance, the American Law Magazine for October appears without that usual part of its contents. The number is an able and interesting one, containing a biographical sketch of Chief Justice Parsons, and six articles on the Conflict of Laws — Compound Interest — Cases of Conflicting Franchises — Liability of Corporations — Power and Privileges of the separate branches of the Legislature — Of the Nature and General Effects of Subrogation. There are also several critical notices, and the usual digest of American cases.

The Western Law Journal for November was published with its usual punctuality, and contains an unusual number of reported cases. We believe the efforts made by the editor to obtain from the several states some account of their local laws upon those topics most important to persons residing at a distance, will be highly useful to the profession, and, indeed, to the whole public. The present number contains the answers from Iowa.

The South-Western Journal for July is just received, and appears to have been recently printed. Nearly six pages of the number is devoted to a notice of the Law Reporter. For the editor's compliments, now and formerly, he has our thanks. We forgive the wit indulged at our expense, and we should overlook the flippancies on p. 165, were not this the second time that the advertisements on the cover of this journal have been alluded to in connection with the editor. We believe we have never shown a disposition to avoid any responsibility that we were justly entitled to bear; but we must again protest against being held accountable for the manner and style of the advertisements on this journal, to which responsible names are attached.

The Pennsylvania Law Journal we have not received for several months.

Chief Justice Mellen. Within the last year, a monument to the memory of the late Chief Justice of Maine has been erected by his professional brethren and associates in that State. During the greater part of his professional life, Mr. Mellen resided in Portland, and his remains were interred in the Western Cemetery in that city. The simple but beautiful and impressive structure that has been erected over his grave, has a most agreeable consistency with the simplicity of the character of the honored subject of this testimonial, and well expresses the abiding affection with which his virtues are regarded by those who knew him best. In its general form, the monument is a diminished pedestal, the whole structure being a little less than ten feet high. A marble base, three feet square, supports a shaft four feet and a half in height, two and a quarter feet square at the base, and slightly diminishing towards the top. The shaft is surmounted by an ornamented capital. The whole structure is of white marble, and rests upon a foundation of granite. The following is the inscription on the north face of the shaft.

Erected by the Bar of Maine,
to the memory of
Prentiss Mellen,
First Chief Justice of
the Supreme Judicial Court
of the State.

On the eastern face of the shaft is the following:

HON. PRENTISS MELLEN, L. L. D.
Born at Sterling, Mass.,
Oct. 11, 1764.
Graduated at Harvard College.
A Senator of the United States,
Appointed Chief Justice in 1820,
Died
December 31, 1840.

As recorded on this monument, Judge Mellen was at one time a Senator of the United States, having been elected

to that station in 1817, by the legislature of Massachusetts, attaining in this respect to the unique distinction of being the first and only inhabitant of the District of Maine, who was thus highly honored, while the district formed a part of Massachusetts. He resigned this office in 1820, on the separation of the two States. His associate in the Senate was the Hon. Harrison G. Otis.

Soon after the death of Judge Mellen a brief memoir of his life was prepared by Professor Greenleaf, of Cambridge, who was long associated, as the reporter of the court, with the judicial labors of the deceased. This tribute is appended to the 17th volume of the Maine Reports.

The service of procuring the funds for the erection of the monument of Judge Mellen and of superintending its execution, was entrusted to a committee of the Cumberland Bar, consisting of Messrs. C. S. Daveis, John Anderson, T. A. Deblois, Augustine Haines, and J. S. Little, Esqrs. The work was executed by Mr. Joseph R. Thompson, of Portland.

New Books. We are very glad to learn that Theodore Sedgwick, Esq, of New York, has undertaken a work upon the *Rule and Law of Damages.*

We are also happy to announce that the first volume of Mr. Duer's great work on *Marine Insurance* is almost ready for the press.

The fourth and *last* volume of Mr. Scammon's Illinois Reports is just published. Who is to be his successor?

Mr. Hilliard has in press the second edition of his *Abridgment of the American Law of Real Estate.*

Hotch-Pot.

It seemeth that this word *hotch*-pot, is in English a pudding, for in this pudding is not commonly put one thing alone, but one thing with other things put together. — *Littleton*, § 267, 176 a.

Lord Eldon is said to have known very little of card-playing, even of the most common and simple games. This led, on one occasion, to a laughable scene in the palace of George III. The royal party were playing at commerce; and, through Lord Eldon's bad luck or bad play, he had soon forfeited his three lives. In perfect ignorance, however, that this catastrophe should have been the signal for his retiring from the contest, Lord Eldon kept his seat at the table, and continued playing. At last Queen Charlotte, perceiving that all his counters were gone, suddenly addressed him, — 'My Lord Chancellor, you are dead!'—We are not aware that any one exclaimed that *the Law Reporter was dead* on reading the following notice of our last number in the Boston Morning Post of November 8; but probably one at least of our democratic readers thought it ought to be: — "*Malignant toryism.* The Law Reporter, an able work, but vindictive as verjuice against all popular principles, contains in its November number a most bitter outpouring of Algerineism against the American Sydney, Thomas W. Dorr. It calls him 'a wretched demagogue,' exults in his sentence and imprisonment, justifies the infamous packing of the jury, and lauds the Jeffries court! Mr. Chandler, the editor of the Reporter, who thus insults every democrat who takes his law journal, is a whig candidate for representative to the legislature. This identifies the whig party with the worst venom of the Rhode Island Algerines. Nay, with all his *Englishism* (for his review never had an American sentiment in it) he justifies Dorr's packed jury in the face of the decision of the law lords in England, who set aside the sentence of O'Connell upon evidence not a hundredth part so strong of packing a jury as was shown in the trial of Governor Dorr. Shame on you, Mr. Chandler, to let your politics pervert your law. F."

Upon the trial of a horse case before Lord Mansfield, a witness was examined, who stated that the horse was returned to his master, after the gentleman who had bought it, had kept it nearly three months. "What," said Lord Mansfield, "was your master willing, at the end of three months, to take it back again? How could he be such a fool? Who advised him to do that?" "My Lord," said the witness, "I advised him to take the horse again." "How could you be such a fool?" said the Chief Justice. "What was your reason for giving that advice?" "Please you my Lord," said the witness, "I told my master what all the world knows, that your Lordship was always against a horse dealer, right or wrong, and therefore he had better take it back."

The House of Lords, sitting in appeals recently, gave judgment in the case of the notorious "Sam Gray." He had been indicted for a felony, (shooting at a man with intent to maim him, and also with intent to do him some grievous bodily harm); and as this indictment did not affect his life, his right to a peremptory challenge was objected to. The Court of Queen's Bench in Ireland had decided against his claim to such a challenge. The prisoner brought that judgment before the Lords on a writ of error. All the English Judges, except Mr. Baron Parke, held that the prisoner was entitled to the peremptory challenge, the right to which attached on all felonies, and was not restricted to those in which the life of a prisoner was in danger. The House affirmed that decision; reversing the judgment of the court below, and ordering that a *venire de novo* be granted.

Obituary Notices.

On Thursday, November 7, at his residence in Woodland, Hon. JOHN BUCHANAN, Chief Justice of the State of Maryland, aged 70.—He was appointed associate justice of the Baltimore judicial district in 1806, and in 1825 took his seat as chief justice of the court of appeals, from which time he presided in such a manner as to have conferred upon himself the reputation of a learned jurist and a most able judge. Notwithstanding his precarious health, he has been indefatigable in his exertions to fulfil the duties of his station. His decisions constitute the monument of his fame.

In the circuit court of the United States, at Baltimore, Mr. Lee, the District Attorney of the United States, announced the death of Mr. Buchanan, and moved an adjournment, which motion was seconded by Mr. Johnson. Mr. Chief Justice Taney on behalf of the court replied as follows:—"I am aware that upon occasions like this, the honors paid to the memory of distinguished men are often considered as very little more than matters of courtesy and form. But in this case I desire to be understood as acting under the influence of very different feelings. It is now more than forty years since Chief Justice Buchanan and myself became acquainted; and during all that time (with the exception of the last few years in which our respective judicial duties prevented us from often meeting,) our intercourse with one another was constant — part of the time as members of the Bar, practising in the same courts, and afterwards in the tribunals in which we presided, and where I continued to be a member of the profession. During the whole of this long period we were intimate and cordial friends, cherishing for each other a warm attachment and respect, and it is a great consolation to me now to recollect that during the whole of that time, no word of unkindness ever passed between us: and that amid the exciting conflicts which unavoidably arise in courts of justice, and which sometimes try the tempers of the coolest and most forbearing, and amid the still stronger excitements which have arisen out of public concerns, there never was one moment of unkind feeling between us — nor a moment in which either of us would not have rendered to the other the best service it was in his power to afford. And as in his life, from the time of our first acquaintance, it would have given me sincere pleasure to offer him proofs of my friendship, I shall now most cordially unite in any measure calculated to show my respect for his memory. The honors proposed to be offered are due, not only to the high judicial station he filled, but also to his personal character, to his untainted honor, his kindness of heart, his great legal attainments, and to the unbending integrity and firmness which marked his character as a man and a judge."

Subsequently, a meeting of all the judges and the bar was held in the court room of the Baltimore county court, which was organized by calling Mr. Chief Justice Taney to the chair, and the appointment of William Schley as secretary. Mr. Reverdy Johnson then introduced some appropriate resolutions, by a few feeling remarks in which he paid a proper tribute to the integrity, the ability and the judicial courtesy of the deceased.

At his residence at Sherbrooke, Canada, on 11th ult., at the advanced age of 77, Hon. JOHN FLETCHER, Provincial Judge of the District of Saint Francis, and one of the Justices of the Court of Queen's Bench for that District, and also of the Provincial Courtof Appeals. Mr. Fletcher was the son of the rector of Dedham in Essex; he was born in Rochester in Kent, and was one of the pupils of St. Paul's school, London. After completing his education he commenced the study of the law, and was in extensive practice in London. Before coming to this country, Mr. Fletcher had become distinguished as a man of science in London, where he was a contributor to many scientific publications, and was well known as a most able and successful lecturer. He arrived in Canada, in the year 1810, and was immediately admitted to the Bar there, and was for many years one of the leading members of the profession, where his great forensic powers are well remembered. During the contest between the two great rival fur companies in the North West territory, he was appointed one of the commissioners for the settlement of the difficulties between them, and had the military rank of Major conferred upon him. The next public position which he held was that of Chairman of the Quarter Sessions; which he resigned upon his appointment to the Judgship of the District of St. Francis, on the erection of the eastern townships into a separate District in the year 1823. In the establishment of a system of judicature in a newly settled country, he had many and great obstacles to contend with, which his great firmness and high sense of duty enabled him to overcome. By the late changes in the judicature his duties were greatly increased, and we regret to learn that his disease was in some measure hastened by his anxiety to perform them, and more particularly by his having presided in Court within a few days of his death, contrary to the advice of his medical attendent. This earnest desire was strikingly manifested in his unremitting attention to the discharge of his duties as one of the members of the Court of Appeals in July last; when those who had known him many years, and were aware of his advanced age, saw with pleasure that his gigantic intellect and faculties were still unimpaired. He was brought up in the faith of the Church of England, of which his father and grand-father were Ministers, and he has lived a sincere member of that Church, and a devoted advocate of its doctrine and institutions.